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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1989

BEGINNING OF TERM

OCTOBER 2, 1989, THROUGH FEBRUARY 20, 1990

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

PROCEEDINGS IN COMMEMORATION OF THE 200TH ANNIVERSARY OF THE FIRST SESSION OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JANUARY 16, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

THE CHIEF JUSTICE said:

The Court is convened today in special session to commemorate the 200th anniversary of its first sitting. We have the privilege of having three distinguished speakers here today to take note of this event. We begin with the former Chief Justice Burger.

Chief Justice Burger:

In a matter of days it will be 200 years since this Court first undertook to meet. On the day set, only three of the six Justices who had been confirmed were present. There being no quorum they met the following day when the fourth Justice arrived. The fifth did not make it at all and the sixth, Justice Harrison, declined the appointment partly on the grounds of health and probably influenced by the reality that riding circuit, with the primitive conditions of travel in that day, was a burden that only a Justice in robust health could undertake.

As we know, this first session was held in a small room on the second floor of a commercial building in New York City

across the street from the Fulton Fish Market near the waterfront. A bronze plaque was placed at this site by the American Bar Association in 1976.

Although the subject of Article III was extensively discussed at Philadelphia and in the ratification conventions, it did not receive the close attention, in some respects, that the other parts of the Constitution were given by the Committee on Style, where it might well have noticed that there was no reference to "Justices" in Article III but simply "judges." That was not consistent with the reference to the Office of Chief Justice in Article I assigning the duty to preside over impeachment trials. In the Judiciary Act of 1789, largely drafted by Senator Oliver Ellsworth, who would become the third Chief Justice, the office is described as "Chief Justice of the United States."

The structure of the federal system included a court of appeals to review the district courts, but it provided no judgeships for that court. It provided that those courts for each of the three circuits be made up of two Supreme Court Justices and one District Judge. Within a few years, the requirement of two Justices was reduced to one, but this required Justices to ride circuit under great hardships of primitive travel and housing. In 1791, Chief Justice Jay urged that judgeships be provided for the courts of appeals and the Congress did so in 1800 but then reversed itself after the election of Thomas Jefferson and the new Congress repealed the Act in 1801. In that day there seemed to be an attitude in the Congress that if the Justices of the Supreme Court were kept busy riding circuit they would be less troublesome to the other branches of government. The history of that early period shows that in a good many instances judges of the state courts declined appointments to the Supreme Court largely because of the circuit riding burden. John Marshall had declined appointment several years before becoming Chief Justice.

Congress finally did respond to the urgings of Chief Justice Jay and his successors by providing judges for the Court of Appeals and eliminating circuit riding burdens, but that was

done, to borrow a phrase from the English equity law, "with all deliberate speed." It was done in 1891.

There being no business before the Court in the first few sessions it undertook housekeeping matters; it appointed a "cryer," adopted a seal for the Court and later appointed a clerk. At its second session it admitted some lawyers, and over the next two years it mainly waited for the pipeline to bring some cases from the lower courts.

In the Court's first 10 years there are less that 70 cases reported in the U. S. Reports of that day. I suspect that members of the Court would like the docket to move in that direction—but without circuit riding.

The precise number of cases and opinions of the Court is not clear because apparently officers of the Court and those compiling the Reports may have decided that a record of some cases was not worth preserving. The records of those early years were not carefully kept and, of those that were kept, some were lost as the Court moved from New York to Philadelphia and then to Washington, and also some were destroyed probably by the British when they occupied Washington in the War of 1812. About 15 years ago the Court and the Historical Society joined in a project to reconstitute those records.

But it would be a mistake to assume that no important cases were decided in that first decade of the Court's history. Often overlooked, but possibly one of the most important, was the case of *Ware* v. *Hylton* argued in 1796 while the Court was sitting in Philadelphia, the only case John Marshall ever argued in this Court. The records indicate that the argument lasted about six days. *Ware* v. *Hylton* is important because it can be read as foreshadowing the holding in *Marbury* v. *Madison* nine years later. The Court held, as we know, that a treaty between the United States and England terminating the war and requiring the payment of debts owed by Americans to British creditors be paid not in state currency but in the equivalent of "gold."

John Marshall lost the case in a unanimous holding of the Court with Justice Samuel Chase writing the lead opinion

and the other Justices, writing separately, following the English custom.

As a judge I think Marshall would have decided *Ware* v. *Hylton* as the Court did. The best argument he could make was that the 1783 treaty did not apply and control the state legislative act because the debts were incurred before the Revolutionary War and before the Constitution. The holding that under Article VI, the treaty prevailed over a legislative act, surely gave some hint of *Marbury*, but the opinion in *Marbury* v. *Madison* does not cite *Ware* v. *Hylton*. Whether that was because he wanted to forget about losing the case we have no way of knowing, but surely that great mind of his must have had in mind that if one clause of the Constitution controls over a legislative act the result in *Marbury* v. *Madison* was quite simple.

The young Supreme Court did not enjoy the prestige that it has today. It was not regarded as a co-equal branch, and some questioned whether it could survive. Even Chief Justice Jay, one of the greats among our founding fathers, did not see much of a future for the Court. He resigned after about six years to become governor of New York. After Adams was defeated in the election of 1800 and Chief Justice Ellsworth resigned on the basis of health, Adams then offered the appointment to Jay. In declining he wrote that he would rather be governor of New York and, in any event, the Supreme Court as a tribunal would never amount to very much.

It was then that John Adams, the lame duck President, turned to his Secretary of State, John Marshall, and invited him to take the appointment. Although Marshall had previously declined an appointment to this Court, he did accept and the year of 1801 began a great epoch in the history of this Court and of this country.

As we take note of this important anniversary of this Court—and of the country—it comes at the close of the decade when people all over the world are demanding the kinds of freedom this Court has been foremost in protecting for 200 years. Our history is their hope, and our hope for them

must be that whatever systems they set up in place of the tyranny they have rejected will include a judiciary with authority and independence to enforce the basic guarantees of freedom, as this Court has done for these 200 years.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Chief Justice. Mr. Rex Lee.

Mr. Lee: MR. CHIEF JUSTICE and may it please the Court:

I am honored to participate in this bicentennial commemoration, and specifically to make some comments concerning the work of the Supreme Court bar over the 200 years of the Court's history.

The clerk's familiar incantation, swearing new members of the bar as "attorneys and counselors" is rooted in some interesting history. Originally, there was a distinction between the two. The first rules of the Court, adopted on Thursday, February 5, 1790, provided that "counsellors shall not practice as attornies nor attornies as counsellors in this court." Historians tell us the difference was that attorneys could file motions and do other paperwork, but only counselors could "plead a case before the Court."[1] The distinction lasted for eleven and one-half years, until by rule adopted on August 12, 1801, the Court ordered "that Counsellors may be admitted as Attornies in this Court, on taking the usual oath."[2]

Over the two centuries of this Court's existence, there have stood before this podium—or its equivalent in other parts of this town, in Philadelphia and New York—some very able and prominent "attorneys and counsellors." It is not surprising that appearances before this Court during its early years were dominated by Attorneys General of the United States; until the creation of the office of the Solicitor General

[1] 2 U. S. (2 Dall.) 399 (1790); 1 *The Documentary History of the Supreme Court of the United States, 1789–1800* 177, n. 18 (M. Marcus & J. Perry eds. 1985).

[2] *Documentary History, supra*, at 177, n. 18.

in 1870, it was the Attorney General who was responsible for representing the United States before this Court. What is surprising is that the most notable and most frequent appearances of those early Attorneys General were not on behalf of the government but in representation of private clients. This was true of the first Attorney General, Edmund Randolph, the second, William Bradford, the seventh, William Pinkney, and the ninth, William Wirt. Indeed, William Wirt, one of the greatest Supreme Court advocates of all time and the man who holds the record for years of service as Attorney General, confessed that "my single motive for accepting the office was the calculation of being able to [obtain] more money for less work."[3] Things were a little different then.

Edmund Randolph, our first Attorney General, was the most active of this Court's early practitioners. He appeared as counsel in the very first case (which came up during the February 1791 Term) *Van Staphorst and Van Staphorst* v. *Maryland*. He also argued the first landmark case, *Chisholm* v. *Georgia*. Indeed, he was the only person who argued in that case. The State of Georgia refused to appear, and at the conclusion of Randolph's argument which lasted two and one-half hours, the Court's minutes reflect that "the Court, after remarking on the importance of the subject now before them . . . expressed the wish to hear any gentlemen of the bar who might be disposed to take up the gauntlet in opposition to the Attorney General. As no gentlemen, however, were so disposed, the Court held the matter under advisement . . . ."[4] It would appear that the rules governing oral argument by *amici* were a bit more liberal in those days.

The same is true of divided arguments, time limits, and questions from the bench. Representing the two sides in the oral argument in *McCulloch* v. *Maryland* was perhaps the greatest collection of prominent advocates in the history

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[3] J. Robert, *The Hon. William Wirt: The Many-sided Attorney General*, Sup. Ct. Hist. Soc'y. Y. B. 1976, at 55.

[4] 1 C. Warren, *The Supreme Court in United States History* 95 (1924) (quoting Dunlap's *American Daily Advertiser*, Feb. 21, 1793).

of this Court's bar. Arguing for the bank were William Pinkney, William Wirt, and Daniel Webster. And representing Maryland were Luther Martin, Joseph Hopkinson, and Walter Jones. The entire argument, by all six counsel, lasted nine days; Thomas Edison's birth was still 28 years away, and there were no red nor white lights. Those were the days when there were no questions; both the commentators and the advocates themselves referred to their arguments as speeches, which they would rehearse for days. Charles Warren relates that "the social season of Washington began with the opening of the Supreme Court term,"[5] and some of those early lawyers, particularly Webster and Pinkney, apparently responded by paying as much attention to the gallery as to the Justices.

Pinkney's argument alone in *McCulloch* lasted for three full days. It was a performance which Professor Warren has said "was to prove the greatest effort of his life. . . ." Pinkney was described by Chief Justice Marshall as "the greatest man [he] had ever seen in a court of justice"; by Chief Justice Taney as one to whom there was "none equal"; by Justice Story as having "great superiority over every other man [he had] ever known"; and by Francis Wheaton as the "brightest and meanest of mankind."[6]

Pinkney had the distinction of serving as Attorney General of both the United States and also the State of Maryland, as a member of both Houses of Congress, and minister to Great Britain and Russia. But whichever of these was paramount, it was in Pinkney's view a distant second to his one consuming passion: advocate before this Court. It was an endeavor to which he gave his life, both figuratively and literally. Following the completion of the last of his 84 arguments, in *Ricard* v. *Williams*—in 1822 with Daniel Webster on the other side—he suffered a collapse. He was carried to his home, where he died a few days later.[7] Incidentally, he lost

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[5] 1 C. Warren, *The Supreme Court in United States History* 471 (1924).

[6] S. Shapiro, *William Pinkney: The Supreme Court's Greatest Advocate*, Sup. Ct. Hist. Soc'y. Y. B. 1988, at 40, 44.

[7] *Id.* at 45.

Ricard v. *Williams*, an unpleasant experience for any lawyer, but one that is well-known to those who are seasoned.

Walter Jones holds the record number of oral arguments with 317. It is a record which, given today's realities, is surely safe for all time. For Mr. Jones, there will be no Roger Maris or Hank Aaron. Daniel Webster is in second place, and it would appear that John W. Davis is third, and Erwin Griswold fourth. But the record number of landmarks, in my opinion, belongs to William Wirt, whose biographer has accurately observed that "he appeared in virtually all of the landmark cases of the first third of the nineteenth century."[8] These included *Dartmouth College* v. *Woodward*, *McCulloch* v. *Maryland*, *Cohens* v. *Virginia*, *Gibbons* v. *Ogden*, *Brown* v. *Maryland*, *Ogden* v. *Saunders*, *Worcester* v. *Georgia*, *Cherokee Nation* v. *Georgia*, and *Charles River Bridge* v. *Warren Bridge*. Wirt was described by Chief Justice Chase as "one of the purest and noblest of men" and by another contemporary as "the most beloved of American advocates."[9]

In four of these landmarks, *Dartmouth College*, *McCulloch*, *Cohens* v. *Virginia*, and *Gibbons* v. *Ogden*, Wirt appeared with Daniel Webster. They argued *Dartmouth College* and *McCulloch* just three weeks apart. He was the Attorney General at that time, and though in *McCulloch* he was arguing to sustain the power of the federal government, he received a substantial fee from the Bank of the United States.[10]

Daniel Webster, though he won slightly less than half of his cases, probably had the greatest influence on the Court and its work of any nineteenth century advocate—perhaps the greatest influence of any advocate in the Court's history. S. W. Finley has observed that "Webster and Chief Justice Marshall shared the same basic constitutional philosophy, and together with Justice Joseph Story they constitute a fortuitous triumvirate in establishing the fundamentals of

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[8] J. Robert, *supra*, at 52.

[9] *Id.*

[10] *Id.* at 56.

American federalism in the first four decades of the nineteenth century."[11]

The twentieth century, of course, is not yet complete, but it is already clear that during the Court's second hundred years, advocates to match the stature of Pinkney, Wirt, and Webster have stood at this podium. Comparisons are difficult because of changes in circumstances and rules, but quite clearly the Court's jurisprudence during this century has been influenced by people such as John W. Davis, Robert Jackson, Thurgood Marshall, and Erwin Griswold, just as it was during earlier times by Pinkney, Wirt, and Webster. And our century also has had its equivalent of *McCulloch*'s battle of the giants when, for example, *Briggs* v. *Elliot*, a companion case to *Brown* v. *Board of Education*, pitted John W. Davis against Thurgood Marshall.

Mr. Chief Justice, we the members of the bar of this Court are proud of the institution whose two hundredth birthday we celebrate, proud of what it has meant and what it has done for our country and its people, and proud of the contribution that the members of the bar have made to the Court and its accomplishments over its 200-year history. We recognize that we are more than attorneys and counselors. As officers of the Court, we are charged not only with the responsibility of vigorously representing our clients but also assuring that our representation is objective, fair, evenhanded, and contributory to the Court's performance of its duties. We are mindful of the institution before which we practice, and the role that it has played from 1790 to 1990 in securing individual rights and providing stable government. We are pleased to offer our continuing services as we enter the Court's third century.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee. Mr. Solicitor General Kenneth W. Starr.

Solicitor General Starr:

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[11] S. W. Finley, *Daniel Webster Packed 'Em In*, Sup. Ct. Hist. Soc'y. Y. B. 1979, at 70.

Almost half a century after this Court's opening session, Alexis de Tocqueville, the French observer of democracy in the new Republic, turned his eye back to the Founding and saw in that remarkable generation the finest minds and noblest characters ever to have graced the New World.

And the wisest, ablest minds of that generation were well represented in the membership of this Court. As we have been reminded, the docket may not have been especially demanding, and the rigors of office may have been daunting, but the Court nonetheless boasted among its members not only its distinguished Chief Justice, John Jay, author along with Madison and Hamilton of *The Federalist Papers*, but also several delegates to the Constitutional Convention itself. Like the Nation's first Attorney General, Edmund Randolph of Virginia (whose successor is here today), Justices Rutledge of South Carolina, Wilson of Pennsylvania, and Blair of Virginia, had served as members of the Convention. Other Justices of the 1790's, including Iredell of North Carolina and Cushing of Massachusetts, had played pivotal roles in their respective States in securing ratification.

To these individuals, along with their counterparts in the political branches, fell the task of forming a workable government. It was John Jay who articulated the basic structural insight:

> "Wise and virtuous men have thought and reasoned very differently respecting Government, but in this they have at length very unanimously agreed. That its powers should be divided into three, distinct, independent Departments—the Executive legislative and judicial."

As Providence would have it, in our system of separated powers, it fell in no small measure to the Court to serve as an instrument of achieving the Madisonian and Hamiltonian vision of a vast commercial republic. That was not without difficulty, since this was to be the branch where, as Hamilton put it, judgment, not will, was to be exercised.

The fundamental importance of the judgment of the judiciary was made manifest early on. That our constitutional

democracy, by virtue of the status of the Constitution as supreme law, would include the power of judicial review was evidenced in the judicial literature as early as 1792 in *Hayburn's Case*. If not before, the decision of *Hylton* v. *United States* in 1796, upholding the constitutionality of the federal Carriage Tax, powerfully foreshadowed *Marbury* v. *Madison*. In short, although the judiciary was to be the least dangerous branch, it was nonetheless to be a truly co-equal, co-ordinate branch with the Legislature and the Executive.

In view of the Court's role, friction between the federal judiciary and the several States was inevitable, just as leading Anti-Federalists such as George Mason had pessimistically predicted. Quite apart from *Chisholm* v. *Georgia*, other decisions of that first decade now dim in the national memory made clear that the national power in its proper sphere extended to and ultimately controlled the States. This was important to be said, and the Court did not flinch from saying it.

These formative principles—of the legitimacy as well as the limits of judicial power, and of the need to vindicate the primacy of the Nation in its appropriate sphere over narrow, parochial interests—provided important grist for the early judicial mill. Along with Washington's stewardship of the Executive power, and the wisdom of the first Congress—graced by Madison himself, who turned his hand to fashioning the Bill of Rights—the leaders of the Nation in all three branches brought to life in 1789 and 1790 what the Framers had envisioned—a balanced government, destined to stand the test of time.

The Nation has endured and prospered. The structure of government has endured. The Court has endured. And with the long-sought abolition of slavery, the promise of legal equality—embodied in the 14th Amendment—took root and grew so that the original vision of the Declaration and the Constitution's vision of a more perfect union, preserved out of bitter conflict, and a true constitutional democracy for all our citizens came fully to life. It was in large measure these events—so important for the work of this Court over the past

century—that brought the Department of Justice into being in the wake of the Civil War.

This was what Tocqueville had seen so clearly, peering as he did into the future, looking at us with prophetic vision. Social equality, as Tocqueville put it, was what America ultimately promised through the emergence of democratic institutions. This was, he felt, the will of God. From the American experience, purified by slavery's inevitable eradication, Tocqueville believed that Europe could learn and morally profit. This was a new order of the ages. Out of the mouths of babes in the New World, truths about what the twentieth century moral imagination of T. S. Eliot would call, simply, the permanent things, would emerge—the moral vision of equal justice under the rule of law. This was, as demonstrated by events now unfolding across the globe, a powerful vision destined to capture the moral imagination of the entire family of mankind.

For that vision brought to life in the judiciary's daily, steadfast service to the law, those of us privileged to serve in the Department of Justice, under the stewardship of the officer whose office was created by the Judiciary Act of 1789, salute the courts of justice and the tribunal ordained in Article III of our beloved Constitution as "one supreme Court." As Lincoln put it so simply at Gettysburg, only seven years before the birth of our own Department, it is entirely fitting and proper that we should do this.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr.

Chief Justice Burger, General Starr, Mr. Lee: your felicitous remarks have shown how the Supreme Court of the United States got off to what was indeed a slow start in New York two hundred years ago, but eventually picked up the necessary speed to evolve into a truly co-equal branch of the federal government.

Half a century ago the Court held a ceremony similar to this one, commemorating the one hundred and fiftieth anniversary of its first session. Attorney General Robert H.

Jackson—soon himself to become a member of this Court—addressed the Court on that occasion saying:

> "[T]his age is one of founding fathers to those who follow. Of course, they will reexamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own . . . . I see no reason to doubt that the problems of the next half-century will test the wisdom and courage of this Court as severely as any half-century of its existence."

None of us here today can doubt the accuracy of Robert Jackson's assessment of this Court's succeeding half-century. All of us realize how significantly—indeed, how dramatically—the interpretation of the United States Constitution has changed in the past fifty years. And yet, we, too, must realize that our work has no more claim to infallibility than that of our predecessors. Daniel Webster said that "Justice is the great end of man on earth"—a statement which attests his wisdom not only as a statesman but as a theologian—and the motto inscribed on the front of this building—"Equal Justice Under Law"—describes a quest, not a destination.

But if we look at the temporal context of the ceremony here in this room fifty years ago, it was vastly different from the one today. The gathering storm of war had burst a few months earlier with the German invasion of Poland. A few months later the German breakthrough in the Ardennes would knock France out of the war, leaving Great Britain and her commonwealth allies fighting alone against the dictators. The fate of constitutional ideals such as self-government and the rule of law seemed to hang in the balance of war.

How different it is today. The allies won the Second World War, and the worth of western values was re-established. In February, 1940, when this Court celebrated its one hundred and fiftieth anniversary, it was virtually the only constitutional court—a court whose existence was based on a written constitution which had the authority to invali-

date legislative acts—sitting anywhere in the world. But after the Second World War, the idea of such a court found favor with nation after nation.

The written Constitution drafted by the Framers in Philadelphia in 1787 incorporated two ideas which were new to the art of government. The first is the system of presidential government, in which the executive authority was separated from the legislative authority. This idea has found little favor outside of the United States, and countries just as committed to democratic self-government as we are have preferred the parliamentary system.

The second idea was that of a constitutional court which should have authority to enforce the provisions of a written constitution. It is this second idea which has commanded itself to country after country following the Second World War. Today its momentum continues. Less than a decade ago Canada adopted a charter of rights to be enforced by its Supreme Court. In countries today which do not have a full-scale constitutional court—Great Britain, Sweden, Australia—proponents of change are engendering lively debate. I do not think that I overstate the case when I say that the idea of a constitutional court such as this one is the most important single American contribution to the art of government.

As we look today towards eastern Europe, where a curtain which had been drawn for nearly half of a century has been lifted only with the past year—it may not be too much to hope that these nations, too, will see fit to reshape their judiciaries on the American model.

The three Justices who gathered in New York City on February 1, 1790, could not possibly have foreseen the future importance of the Court upon which they accepted the call to serve. I am confident that even those who gathered here fifty years ago could not have foreseen the changes and developments in the law which would come in the next half-century, nor the influence that this institution would have outside its borders during that time. And surely the same is true of those of us who have gathered here today to commemorate the bicentennial of the Court's first sitting.

We have no way of knowing with certainty where the quest for equal justice under law will lead our successors in the next half-century. If at times our labors seem commonplace or even unavailing, let us hark to the words of Arthur Hugh Clough:

> "And not by eastern windows only
> When daylight comes, comes in the light;
> In front the sun climbs slow, how slowly!
> But westward, look, the land is bright!"

DEATH OF JUSTICE GOLDBERG

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 22, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

As we open this morning we note with sadness the death last Friday of Arthur J. Goldberg, former Justice of this Court.

Born of immigrant parents in Chicago, he graduated with honors from Northwestern Law School when he was only twenty-one. His career exemplified a life-long interest in public affairs. During thirty years of private practice in the middle part of this century, he served as General Counsel to the CIO, and was instrumental in effecting its merger with the AF of L in 1955.

When President John F. Kennedy took office in 1961, he chose Arthur Goldberg to be his Secretary of Labor. Barely a year and a half later he appointed Justice Goldberg to this Court to succeed Justice Felix Frankfurter. Justice Goldberg left the Court three years later to accept appointment from President Lyndon Johnson as the United States Ambassador to the United Nations. He served in that post during a very difficult period of the Vietnam War, and after leaving it returned to the practice of law.

Though Justice Goldberg served on this Court for a comparatively brief period of time, he made important contributions to its jurisprudence. I speak for all members of the

Court in expressing our profound sympathy to the family of Justice Goldberg. The recess which the Court takes today will be in memory of Justice Goldberg, and at an appropriate time there will be a traditional memorial observance in this Courtroom.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1989

TERRELL *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–7535. Decided October 10, 1989

When petitioner Terrell sought postconviction relief in the Ohio courts, they held that he had defaulted his ineffective-assistance-of-counsel claim by failing to raise it on direct appeal as required by *State* v. *Cole*, 2 Ohio St. 3d 112, 443 N. E. 2d 169. Before *Cole*, Ohio had permitted such claims in collateral challenges even if they had not been presented on direct appeal. Terrell then petitioned for a federal writ of habeas corpus, arguing that the *Cole* rule postdated his appeal, and that he could not have known that he would default his claim if he failed to raise it on direct appeal. The District Court agreed, finding that Ohio could not invoke its procedural default rule retroactively, but proceeded to deny Terrell's claim on the merits. The Court of Appeals affirmed on the ground that the District Court properly determined that the ineffective-assistance claim was not reviewable because of Terrell's failure to raise it in the state-court proceedings.

Held: The Court of Appeals affirmed a decision that the District Court never made and so never reviewed that court's actual decision. The District Court reached the merits of Terrell's claim after it determined that the only applicable default rule postdated his conviction. However, the Court of Appeals neither noted nor addressed the retroactivity issue. Review of the procedural bar and retroactivity issues should be undertaken based on a correct formulation of the District Court's ruling.

Certiorari granted; 872 F. 2d 1029, vacated and remanded.

PER CURIAM.

Petitioner Terrell is incarcerated in a state prison in Ohio. After applying for state-law postconviction relief, he petitioned for a federal writ of habeas corpus pursuant to 28 U. S. C. § 2254 (1982 ed.).

Terrell's habeas petition includes an ineffective-assistance-of-counsel claim. The Ohio courts held in postconviction proceedings that Terrell had defaulted this claim by failing to raise it when represented by new counsel on direct appeal. In so doing, the Ohio courts relied upon *State* v. *Cole*, 2 Ohio St. 3d 112, 113–114, 443 N. E. 2d 169, 171 (1982). The *Cole* rule postdated Terrell's appeal, which was decided on December 30, 1981. Before *Cole*, Ohio had permitted ineffective-assistance claims in collateral challenges even if a petitioner had not raised those claims when represented by new counsel on direct appeal. See *State* v. *Hester*, 45 Ohio St. 2d 71, 71–72, 74–75, 341 N. E. 2d 304, 305, 307 (1976) (permitting a postconviction ineffective assistance claim to go forward despite a failure to raise the issue on direct appeal); see also *Cole*, *supra*, at 113–114, 443 N. E. 2d, at 171 (expressly modifying *Hester*).

Terrell thus could not have known that he would default his ineffective-assistance claim by his new counsel's failure to raise it on direct appeal. Terrell argued to the Federal District Court that the State could not invoke its procedural default rule retroactively. The District Judge agreed and proceeded to the merits of Terrell's ineffective-assistance claim.

The Sixth Circuit disposed of Terrell's *pro se* appeal in a *per curiam*, unpublished opinion. *Terrell* v. *Marshall*, 872 F. 2d 1029 (1989) (judgment order). The Court of Appeals held that "the District Court properly determined that Terrell's" ineffective-assistance claim, as well as several other claims, "were not reviewable" because of Terrell's "failure to raise these claims in state court proceedings." App. to Pet. for Cert. A–2. The District Court had, however, made no

such determination: the District Court reached the merits of the ineffective-assistance claim because the only applicable procedural default rule postdated Terrell's conviction. The Court of Appeals neither noted nor addressed the retroactivity issue.*

The Sixth Circuit, by its unpublished opinion, affirmed a decision that the District Court never made, and so never reviewed that court's actual decision. Review of the procedural bar and retroactivity issues should be undertaken based on a correct formulation of the ruling in the District Court. Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted. The judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

The Court summarily vacates an unpublished *per curiam* opinion of the Court of Appeals for the Sixth Circuit without indicating that the Sixth Circuit committed legal error or that intervening circumstances require reconsideration of its decision. Because I view this action as an unwarranted use of the Court's resources and an unjustified imposition on the Court of Appeals, I dissent.

*The author of the Court of Appeals' unpublished opinion may have relied on the Magistrate's conclusion that petitioner's ineffective-assistance-of-counsel claim was barred by procedural default. See App. to Pet. for Cert. C–4. The Magistrate, however, had neither noted nor addressed the retroactivity issue that the District Court resolved in petitioner's favor. Because the question whether the Ohio Supreme Court's decision in *State* v. *Cole*, 2 Ohio St. 3d 112, 443 N. E. 2d 169 (1982), should be given retroactive effect may govern the disposition of a significant number of ineffective-assistance-of-counsel claims, the question clearly merits the attention of the Court of Appeals. Moreover, since the answer to the question requires a familiarity with Ohio law, it should not be addressed in this Court before we have the benefit of the Court of Appeals' views.

As the Court explains, the Sixth Circuit concluded that "'the District Court properly determined'" that Terrell's ineffective-assistance claim was procedurally barred. The Court's sole stated reason for vacating that decision is that the Court of Appeals erroneously attributed to the District Court a conclusion it never made. Although the Court of Appeals appears to have been wrong as to the basis of the District Court's ruling, the appellate court's statement unequivocally expresses agreement with the view that the claim was procedurally barred. This, then, is simply a case of an appellate court affirming a district court's dismissal on a legal basis different from that adopted by the district court—a not uncommon practice.

Underlying the Court's summary disposition of this case appears to be an assumption that the Sixth Circuit did not consider the adequacy of the Ohio courts' procedural bar holding. The Court of Appeals, however, had before it and made reference to the Magistrate's report and the District Court's decision, both of which discussed the issue. It is not our place to vacate a Court of Appeals' opinion on the supposition that the court failed to give sufficient thought to its own holding, merely because we would prefer a more extended discussion. Unless the Court is prepared to reverse the Court of Appeals' reliance on procedural bar, there is no basis for setting aside the decision below. This Court has debated the appropriateness of performing an "error-correcting function," see, *e. g.*, *Pennsylvania* v. *Bruder*, 488 U. S. 9, 12–13 (1988) (STEVENS, J., dissenting). But I have no doubt that vacation of unpublished lower court opinions without *any* suggestion of error or intervening change in the law is an unwise use both of our resources and of those of the Court of Appeals.

WHITE, EXECUTOR OF THE ESTATE OF SMITH *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-928. Argued October 3, 1989—Decided October 16, 1989

Certiorari dismissed. Reported below: 853 F. 2d 107.

Kenneth A. Payment argued the cause for petitioner. With him on the briefs was *James M. White, pro se.*

Alan I. Horowitz argued the cause for respondents. With him on the brief were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Charles E. Brookhart,* and *Joan I. Oppenheimer.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

JUSTICE WHITE dissents.

**Waller H. Horsley, Louis A. Craco, Charles E. Heming, Jonathan G. Blattmachr, Arthur M. Sherwood, Alexander C. Cordes, Sanford J. Schlesinger, Jules J. Haskel, Albert Kalter, Thomas P. Sweeney,* and *Geraldine S. Hemmerling* filed a brief for the New York State Bar Association et al. as *amici curiae* urging reversal.

NORTHBROOK NATIONAL INSURANCE CO. *v.* BREWER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-995. Argued October 4, 1989—Decided November 7, 1989

Texas law provides that any party dissatisfied with a State Industrial Accident Board workers' compensation ruling may bring a civil suit to set the decision aside. The court determines such cases *de novo*, and the party seeking compensation bears the burden of proof regardless of which party prevailed before the board. Pursuant to Texas law, respondent Brewer, a Texas citizen employed by a Texas corporation, filed a workers' compensation claim with the board against the employer's insurer, petitioner here, an Illinois corporation with its principal place of business in that State. After the board awarded Brewer compensation, petitioner filed an action in Federal District Court, invoking the court's diversity jurisdiction under 28 U. S. C. § 1332. The court dismissed for lack of subject-matter jurisdiction. Holding that Fifth Circuit precedent, *Campbell* v. *Insurance Co. of North America*, 552 F. 2d 604, required it to apply the direct action proviso of § 1332(c)—which states that "in any direct action *against* the insurer of a policy . . . of liability insurance . . . , such insurer shall be deemed a citizen of the State of which the insured is a citizen . . ."—the court attributed the employer's Texas citizenship to petitioner, thus eliminating diversity between petitioner and Brewer. The Court of Appeals affirmed.

Held: The direct action proviso does not apply to actions brought in federal court by an insurer. The proviso's language unambiguously applies only to actions *against* insurers and does not mention actions *by* insurers. This reading is reinforced by the proviso's legislative history. *Campbell*'s analysis—that an action such as petitioner's is an action against an insurer, since the entire process is initiated by an employee's claim to the board, since the employee has the burden of proof at the trial, and since the insurer's action is merely an "appeal" of the board's ruling—is rejected. Although the employee retains some of the characteristics of a plaintiff at trial, the action is commenced when the insurer files the complaint in court, not when the employee files his claim with the board. Moreover, the board's award is vacated once the court acquires jurisdiction over the suit. The seeming incongruity Congress created by retaining diversity jurisdiction over actions brought by out-of-state insurers while withdrawing removal jurisdiction when it eliminated diversity

jurisdiction in actions brought against them is insufficient to persuade this Court to extend the scope of the proviso's precise wording. Cf. *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348, 351–352. Pp. 9–13.

854 F. 2d 742, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 13.

P. Michael Jung argued the cause for petitioner. With him on the briefs was *E. Thomas Bishop*.

Timothy M. Fults argued the cause and filed a brief for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the "direct action" proviso of 28 U. S. C. § 1332(c) (1982 ed.)—which provides that in a direct action *against* a liability insurer, the insurer shall be deemed a citizen of the same State as the insured for purposes of diversity jurisdiction—applies to a workers' compensation action brought in federal court *by* an insurer. The Fifth Circuit held that the proviso applied so as to bar a diversity action brought by an Illinois insurer of a Texas corporation against a Texas employee. 854 F. 2d 742 (1988). Accordingly, it affirmed the District Court's dismissal for lack of subject-matter jurisdiction. Because the language of the proviso is unambiguously limited to actions brought *against* insurers, we reverse.

I

Respondent Larry Brewer is a Texas citizen and an employee of Whitmire Line Clearance, Inc., a Texas corporation. Petitioner Northbrook National Insurance Company, an Illinois corporation with its principal place of business in that State, was Whitmire's workers' compensation insurer. Under the Texas Workers' Compensation Act, an employee

**Michael A. Carvin* and *Craig Berrington* filed a brief for the American Insurance Association as *amicus curiae* urging reversal.

who suffers an injury in the course of employment "shall have no right of action against [the] employer . . . but . . . shall look for compensation solely to the [employer's insurer]." Tex. Rev. Civ. Stat. Ann., Art. 8306, § 3(a) (Vernon Supp. 1989). An employee must file his claim for compensation with the Texas Industrial Accident Board. Art. 8307, § 4a. Brewer filed a workers' compensation claim against Northbrook after he allegedly suffered an injury during the course of his employment. The board processed his claim and awarded him compensation.

Texas' workers' compensation law permits any party dissatisfied with a board ruling to bring a civil suit to set the decision aside. Art. 8307, § 5. The court determines the issues *de novo*, and the party seeking compensation bears the burden of proof, regardless of which party prevailed before the board. *Ibid.*

Northbrook filed suit against Brewer in Federal District Court, invoking the court's diversity jurisdiction under 28 U. S. C. § 1332 (1982 ed.). The District Court dismissed for lack of subject-matter jurisdiction, holding that Fifth Circuit precedent, *Campbell* v. *Insurance Co. of North America*, 552 F. 2d 604 (1977) *(per curiam)*, required it to apply the direct action proviso of the diversity statute. App. to Pet. for Cert. A–11. That proviso states:

> "[I]n any direct action *against* the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business." 28 U. S. C. § 1332(c) (1982 ed.) (emphasis added).

The District Court therefore attributed Whitmire's Texas citizenship to Northbrook, eliminating diversity between

Northbrook and Brewer. The Court of Appeals affirmed on the basis of *Campbell*. It noted, however, that *Campbell* stood on "weak jurisprudential legs." 854 F. 2d, at 745.

II

We hold that the direct action proviso is not applicable in this case because Northbrook's suit was an action by, not against, an insurer.[1] "[W]e must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth." *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348, 352 (1961) (holding that Congress' elimination of removal jurisdiction over workers' compensation suits did not withdraw original diversity jurisdiction over such suits). The language of the proviso could not be more clear. It applies only to actions *against* insurers; it does not mention actions *by* insurers.

The proviso's legislative history reinforces our reading of Congress' pellucid language. Congress added the proviso to § 1332(c) in 1964 in response to a sharp increase in the caseload of Federal District Courts in Louisiana resulting largely from that State's adoption of a direct action statute, La. Rev.

[1] Petitioner also argues that the proviso is inapplicable because this case does not involve a "direct action" within the meaning of § 1332(c). A direct action, according to petitioner, is a suit in which a party claiming injury seeks relief from the liability insurer of the party legally responsible for the injury; in such an action, the injured party neither joins nor first obtains a judgment against the legally responsible party. Petitioner contends that a workers' compensation suit against an employer's insurer is not a direct action in Texas because employers are not legally responsible for workers' compensation benefits under Texas law. Tex. Rev. Civ. Stat. Ann., Art. 8306, § 3(a) (Vernon Supp. 1989). Instead, the injured party must "look for compensation solely to the [insurer]." *Ibid.* Similarly, because Texas employers are not liable for workers' compensation benefits, petitioner asserts, Whitmire's policy with Northbrook did not provide "liability insurance" within the meaning of the proviso. We need not reach these arguments because we hold that the suit at issue here was not an action "against" an insurer.

Stat. Ann. § 22.655 (West 1959). See S. Rep. No. 1308, 88th Cong., 2d Sess., 4 (1964); H. R. Rep. No. 1229, 88th Cong., 2d Sess., 4 (1964). The Louisiana statute permitted an injured party to sue the tortfeasor's insurer directly without joining the tortfeasor as a defendant. Its effect was to create diversity jurisdiction in cases in which both the tortfeasor and the injured party were residents of Louisiana, but the tortfeasor's insurer was considered a resident of another State. Believing that such suits did "not come within the spirit or the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system," S. Rep. No. 1308, *supra*, at 7, Congress enacted the proviso "to eliminate under the diversity jurisdiction of the U. S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly *against* a foreign insurance carrier without joining the local tort-feasor as a defendant," *id.*, at 1 (emphasis added). See also H. R. Rep. No. 1229, *supra*, at 1. Nowhere in the legislative history did Congress express any concern about diversity actions filed *by* insurance carriers.

The Fifth Circuit in *Campbell* reasoned that a suit such as Northbrook's is, in context, actually an action *against* the insurer. The court noted that the entire process is initiated by the employee's filing a claim with the board, and that the employee retains the burden of proof at trial. It also considered the insurer's action in court merely an "appeal" of the board award. 552 F. 2d, at 605.

We reject this analysis. Although the employee in an action brought by the insurer retains some characteristics of a plaintiff at trial, such an action is still inescapably one by, not against, the insurer. The action is commenced when the insurer files a complaint in federal court, not when the employee files his claim before the board. See Fed. Rule Civ. Proc. 3 ("A civil action is commenced by filing a complaint with the court"). Moreover, once the court acquires juris-

diction over the suit, the board's award is vacated and no longer has any force or significance. *Latham* v. *Security Ins. Co. of Hartford*, 491 S. W. 2d 100, 104 (Tex. 1972). See also *Horton*, *supra*, at 355, n. 15 ("This makes it all the more clear that the matter in controversy between the parties to the suit is not merely whether the award will be set aside since the suit automatically sets it aside for determination of liability *de novo*"). Thus, this Court concluded in *Horton* that such actions are not considered appeals under Texas law. 367 U. S., at 354 (citing *Booth* v. *Texas Employers' Ins. Assn.*, 132 Tex. 237, 246, 123 S. W. 2d 322, 328 (1938)).

The *Campbell* court also reasoned that the same policy considerations that apply to actions brought by resident employees apply to actions brought by out-of-state insurers; thus, the court stated that it would be unfair to provide those insurers access to federal courts while denying such access to employees. 552 F. 2d, at 605. Petitioner argues, however, that *Campbell* ignored a crucial difference between the two situations that justifies different treatment. Absent federal jurisdiction, a workers' compensation action would be brought in a Texas state court, regardless of which party initiated it. Tex. Rev. Civ. Stat. Ann., Art. 8307a (Vernon Supp. 1989) (suit must be brought in county in which injury occurred or in which employee resided at the time of injury). Thus, the out-of-state insurer, unlike the resident employee, would, "at least in theory, be subject to a local prejudice in favor of the injured resident." *Aetna Casualty & Surety Ins. Co.* v. *Greene*, 606 F. 2d 123, 127 (CA6 1979) (rejecting *Campbell*'s approach).

Petitioner's position is not wholly convincing. Although it may explain why Congress would permit out-of-state insurers, but not injured state residents, to sue in federal court, it does not explain why Congress would deny those insurers access to a federal forum when injured residents initiate suit in state court. By eliminating diversity jurisdiction over

direct actions against out-of-state insurers, Congress also prevented those insurers from removing such actions to federal courts, because federal removal jurisdiction is limited to actions which could have been brought originally in federal courts. See 28 U. S. C. § 1441(a) (1982 ed.).[2] Yet it is difficult to see how the nonresident insurer's interest in a federal forum is any greater when it brings the action than when an injured resident does. It therefore seems somewhat anomalous for Congress to retain original diversity jurisdiction over actions by out-of-state insurers while withdrawing removal jurisdiction.

This seeming incongruity, however, is insufficient to persuade us to extend the scope of Congress' precise wording in § 1332(c). In *Horton*, this Court confronted a similar question: whether Congress' explicit withdrawal of removal jurisdiction over workers' compensation cases, see n. 2, *supra*, precluded a diversity action brought in the first instance by an out-of-state insurer under the Texas workers' compensation statute. The District Court had answered that question in the affirmative, reasoning that the concerns that persuaded Congress to eliminate removal jurisdiction—reducing congestion in federal courts and relieving injured employees of the burden of having to litigate in more distant federal courts—were also applicable when nonresident insurers initiated the actions. 367 U. S., at 351–352. Although this Court noted that these considerations were "appealing," *id.*, at 352, it refused to assume that Congress intended anything more than it had stated in unambiguous terms. *Ibid.* Similarly, we refuse to attribute to Congress an intent broader than that specifically expressed in the direct action proviso. Congress could easily have used language to bar suits *by* in-

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[2] In this case, removal would also be precluded by 28 U. S. C. § 1445(c) (1982 ed.) which states: "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

surers as well as those *against* insurers, and it can easily do so still. See *ibid.*

In sum, the direct action proviso is limited by its terms to actions against insurers. We cannot doubt that Congress meant what it said. We therefore reverse the decision of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

Workers' compensation is generally a subject of local interest and control with which federal courts have only minimal contact. The Texas Workers' Compensation Act is unusual because employers who carry workers' compensation insurance normally are not parties to the processing of claims that are made against their insurers. Moreover, when an award is made, either the employee or the insurance company may obtain *de novo* review in a judicial proceeding in which the employee bears the burden of proof regardless of which party requested review. In other words, in both the administrative proceeding and the judicial proceeding, the employee is the party who must assert and prove that his claim against a carrier is meritorious.

One of the consequences of the unique Texas program was the generation of an unusually large volume of federal litigation between Texas employees and out-of-state insurance companies. In 1957 the dockets of the United States District Courts in Texas were burdened with 2,147 Texas workers' compensation cases. Over half of them (1,148) were cases that had been originally filed in a Texas court and removed to a federal court. Of the remainder, 957 were original actions filed by employees and 25 were original actions filed by insurance carriers.[1] The statute enacted by Con-

[1] There were also 17 cases transferred from other jurisdictions. See S. Rep. No. 1830, 85th Cong., 2d Sess., 8 (1958).

gress in 1958,[2] which prevents the removal of workers' compensation cases, eliminated a little over half of that burden but did not affect the actions originally filed in the federal district court by either employees or insurance carriers. See *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348, 352 (1961); see also *ante*, at 9.

In 1964, Congress passed another statute further curtailing federal diversity jurisdiction over claims against insurance carriers. As the Court correctly notes, *ante*, at 9–10, that statute was a response to the dramatic increase in the workload of the Federal District Courts in Louisiana resulting from the enactment of the Louisiana statute authorizing injured parties to bring direct actions against insurance companies without joining the alleged tortfeasors as parties.[3] The legislative history of that statute does not mention workers' compensation cases. The question whether the 1964 statute ousted the federal courts in Texas of jurisdiction over the remaining half of their workers' compensation docket was, therefore, not answered by legislative history.

The United States Court of Appeals for the Fifth Circuit has, however, answered that question in two steps. In 1974, in *Hernandez* v. *Travelers Ins. Co.*, 489 F. 2d 721, cert. denied, 419 U. S. 844 (1974), the Court of Appeals held that a workers' compensation policy is a "policy or contract of liability insurance" and that an action against an insurer on such a policy is a "direct action" within the meaning of 28 U. S. C. § 1332(c) (1982 ed.).[4] That holding took care of over 95 per-

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[2] "Sec. 5. (a) Section 1445 of title 28 of the United States Code is amended by adding at the end thereof a new paragraph as follows:

"'(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.'" 72 Stat. 415.

[3] See H. R. Rep. No. 1229, 88th Cong., 2d Sess., 4–5 (1964).

[4] That section provides:

"(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of busi-

cent of the post-1958 residue of Texas workers' compensation cases. In 1977, the Fifth Circuit took the second step to dispose of the remaining handful of cases—those originally filed in federal court by insurance companies. In *Campbell* v. *Insurance Co. of North America*, 552 F. 2d 604 (1977), the court held that the specific characteristics of the Texas workers' compensation statute made it appropriate to treat a federal action that had been filed by the insurance carrier as an action "against the insurer" within the meaning of the proviso to § 1332(c).

Today the Court rejects the second, relatively unimportant, holding in *Campbell*, and leaves standing the decision in *Hernandez*. The net result of this case, then, is to preserve federal jurisdiction over the tiny fraction of Texas workers' compensation cases that are brought by insurance carriers and to leave untouched the interpretation of the statute governing the other 97½ percent. Since the *Hernandez* decision is consistent with the interpretation of the proviso to § 1332(c) that has been adopted in other Circuits, see *Aetna Casualty & Surety Ins. Co.* v. *Greene*, 606 F. 2d 123, 126 (CA6 1979), and since the question whether the case involves a "direct action" and a "policy of liability insurance" turns in large part on an understanding of specific features of the Texas statute, I agree with the Court's decision to leave that holding untouched. I disagree, however, with its disposition of the issue it does decide.

On the merits, three characteristics of the Texas scheme make it appropriate to characterize the judicial review of a compensation award as an action "against" the insurance carrier regardless of which party initiated the review proceed-

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ness: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

ing. First, the underlying claim for compensation that is at issue from beginning to end is unquestionably a claim against the insurance company. Second, the fact that as a matter of state law the burden of proof remains on the employee is of more importance in determining the true character of the judicial proceeding than the identity of the party who filed the initial pleading.[5] Third, and perhaps of greatest importance, the question whether the matter in controversy is sufficient to sustain federal jurisdiction is determined by the magnitude of the employee's claim, rather than by the amount of the award that the insurance company challenges. *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348 (1961).[6]

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[5] "The specific question is this: Does an alignment of the parties in relation to their real interests in the 'matter in controversy' satisfy the settled requirements of diversity jurisdiction?

"As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an 'actual,' *Helm* v. *Zarecor*, 222 U. S. 32, 36, 'substantial,' *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss*, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180." *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69 (1941).

[6] As Judge Tuttle has explained:

"The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to 'set aside' the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogates the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to 'set aside' the award. To the contrary, once an action such as this

Arguably, these three features of the Texas scheme are not sufficient to overcome the Court's literal approach to the art of statutory interpretation. They are, however, buttressed by three additional considerations that are persuasive to me. First, since the resolution of the issue depends largely on a correct understanding of a state statute, I believe we should give deference to the Court of Appeals' evaluation of the characteristics of the Texas procedures. Cf. *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976). Second, that court's interpretation of the law provides evenhanded treatment to both parties, whereas the opinion this Court expresses today gives favored treatment to the insurance carriers;[7] it seems un-

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is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such an action, it is a 'plaintiff' in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

"Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to this notice by filing a claim for compensation against the insurer. The insured's 'counterclaim' is, for all intents and purposes, the *only* claim involved in the action." *Hardware Mutual Casualty Co.* v. *McIntyre*, 304 F. 2d 566, 570 (CA5) (citations omitted), cert. denied, 371 U. S. 878 (1962).

[7] In his dissenting opinion in *Horton* v. *Liberty Mutual Ins. Co.*, 367 U. S. 348, 362–363 (1961), Justice Clark, who was also familiar with Texas procedures, observed:

"Moreover, the Senate Report expressed concern for the problems of the injured employee in federal court,

" '[S]ome of these State [workmen's compensation] statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court.' S. Rep. No. 1830, 85th Cong., 2d Sess. 9.

"While 28 U. S. C. § 1332 does not specifically prohibit the filing of original workmen's compensation cases, a clearer expression of congressional dis-

likely that Congress intended the 1964 statute to have that kind of discriminatory impact. Third, the Court's construction of the provision ignores the dominant policy that should be heeded whenever we construe statutes governing federal diversity jurisdiction.

> "These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 108–09; *Healy* v. *Ratta*, 292 U. S. 263, 270." *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 76 (1941).

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like for saddling federal courts with such cases could hardly be imagined. We should, therefore, give effect to this policy wherever possible. Not only does the decision today fail to do this, but the Court goes out of its way to defeat the congressional intent. The statement that 'the workman has the option to file his case in either the Federal or the State court,' S. Rep. No. 1830, 85th Cong., 2d Sess. 9, is no longer correct. It is now an unequal race to the courthouse door—a race which the insurers will invariably win, since they have resident counsel in Austin (the location of the Texas Industrial Accident Board) who quickly secure news of Board awards and are thus enabled to 'beat' the workman in the choice of forums. Thus, the Court—contrary to the specifically expressed intention of the Congress—grants the insurance companies the option of going into federal court, with all its attendant difficulties to the already overburdened federal judiciary and the impecunious workman."

Finally, I must add a word about the unwisdom in granting certiorari to decide the merits of this case. The law had been settled in the Fifth Circuit in a perfectly sound and sensible way for over a decade when at least four Members of this Court voted to hear this case. Measured by 1957 standards, the question we decide today affects only 25 cases out of a total that then amounted to 2,147. Since the jurisdictional amount has since been increased from $3,000 to $50,000, the number of cases actually affected by today's decision may be even smaller.[8] Thus, although it is true as the Court observes that Congress has the power to amend the statute to eliminate its disparate consequences, *ante*, at 12–13, it is hardly likely to consider such action worth the effort. The most significant aspect of today's decision is the revelatory light it sheds on the way we manage our scarce resources.

I respectfully dissent.

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[8] It is true that the Court of Appeals for the Sixth Circuit had held that a declaratory judgment action brought by an insurance company to construe a workers' compensation policy is not an action "against" the company within the meaning of the proviso, *Aetna Casualty & Surety Ins. Co.* v. *Greene*, 606 F. 2d 123 (1979), and that case might at first blush have been thought to create a conflict with the Fifth Circuit's decision in *Campbell* v. *Insurance Co. of North America*, 552 F. 2d 604 (1977). That apparent conflict, however, was wholly illusory because the special characteristics of the Texas workers' compensation statute were not replicated in Tennessee. Indeed, in later cases the Fifth Circuit has itself recognized that the holding in *Campbell* is not applicable to actions filed by insurance companies seeking constructions of policies covering liability for personal injury. See *Evanston Ins. Co.* v. *Jimco, Inc.*, 844 F. 2d 1185, 1189 (1988); *Dairyland Ins. Co.* v. *Makover*, 654 F. 2d 1120, 1124–1125 (1981).

HALLSTROM ET UX. *v.* TILLAMOOK COUNTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–42. Argued October 4, 1989—Decided November 7, 1989

Subsection (a)(1) of the citizen suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U. S. C. § 6972, permits any person to commence a civil action against an alleged violator of waste disposal regulations promulgated under the Act, "[except] as provided in subsection (b)." Subsection (b), entitled "[a]ctions prohibited," provides that no such suit may be commenced prior to 60 days after a plaintiff has given notice of the violation to the Environmental Protection Agency (EPA), the federal body charged with enforcing RCRA, to the State in which the alleged violation occurred, and to the alleged violator. Believing that respondent's sanitary landfill violated RCRA standards, petitioners, the owners of a farm next to the landfill, sent respondent written notice of their intent to sue and, one year later, commenced this action. Respondent moved for summary judgment on the ground that the District Court lacked jurisdiction because petitioners had failed to notify the State of Oregon and the EPA as required by § 6972(b). Petitioners then notified the state and federal agencies of the suit. The District Court denied respondent's motion on the ground that petitioners satisfied RCRA's notice requirement by notifying these agencies and, after trial, held that respondent had violated RCRA. The Court of Appeals remanded the action with instructions to dismiss, concluding that petitioners' failure to comply with the 60-day notice requirement deprived the District Court of subject matter jurisdiction.

Held: Where a party suing under RCRA's citizen suit provision fails to meet the notice and 60-day delay requirements of § 6972(b), the action must be dismissed as barred by the terms of the statute. Pp. 25–33.

(a) The plain language of the statute establishes that compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit and may not be disregarded at a court's discretion. Actions commenced prior to 60 days after notice are "prohibited" under § 6972(b), and, because this language is expressly incorporated by reference into § 6972(a), it acts as a specific limitation on a citizen's right to bring suit. Pp. 25–26.

(b) None of petitioners' arguments for giving the statute a flexible or pragmatic construction require this Court to disregard the statute's plain language. The argument that the notice requirement should be deemed

satisfied if a suit commenced without proper notice is stayed until 60 days after notice has been given is rejected. Whether or not a stay is in fact the functional equivalent of precommencement delay, staying judicial action once the suit has been filed does not honor § 6972(b)'s prohibition on the filing of a complaint before the 60-day notice requirement is fulfilled. Although Congress excepted parties from complying with a delay requirement elsewhere in RCRA, it did not do so in petitioners' situation, and this Court may not create such an exception where Congress has declined to do so. The contention that the 60-day notice provision is subject to equitable modification and cure is also unavailing. The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' failure to take the minimal steps necessary to preserve their claims. Nor can petitioners' failure be excused on the ground that it would be unfair to hold them, as laypersons, to strict compliance with the statute, since this suit, like RCRA citizen suits generally, was filed by a trained lawyer. *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, distinguished. Petitioners' reliance on the legislative history of citizen suit provisions is also misplaced, since nothing in that history militates against honoring the plain language of the notice requirement. In fact, requiring citizens to comply with the notice and delay requirements furthers Congress' goal of striking a balance between encouraging citizen suits and avoiding burdening the federal courts with excessive numbers of such suits, since notice allows government agencies and alleged violators to achieve compliance without the need for suit. Petitioners' assertion that giving effect to the literal meaning of the notice provisions would allow violations to go unchecked during the 60-day waiting period is not persuasive, since this problem results from the balance knowingly struck by Congress in developing the citizen suit provisions, and since it is likely that compliance with the notice requirement will trigger appropriate federal or state enforcement actions to prevent serious damage. Moreover, it is not irrational to require a citizen to wait 60 days to commence suit after agencies and alleged violators have specifically declined to act in response to notice by the citizen, since a violator or agency may change its mind as the threat of suit becomes imminent. Pp. 26–31.

(c) In light of this Court's literal interpretation of the statutory requirement, the question whether § 6972(b) is jurisdictional in the strict sense of that term or is merely procedural need not be determined. Requiring dismissal for noncompliance with the notice provision is supported by the EPA and will further judicial efficiency by relieving courts of the need to make case-by-case determinations of when or whether failure to comply is fatal. Pp. 31–32.

(d) Although there is some merit to petitioners' contention that requiring dismissal of this action wastes judicial resources, the factors that have led this Court to apply decisions nonretroactively are not present here: this decision does not establish a new rule of law or overrule clear past precedent on which litigants may have relied, and the statute itself put petitioners on notice of the requirements for bringing suit. Retroactive operation of this decision will further Congress' purpose of giving agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations. Moreover, dismissal will not deprive petitioners of their "right to a day in court," since they remain free to give the statutorily required notice and file their suit. Pp. 32–33.

844 F. 2d 598, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 33.

Kim Buckley argued the cause for petitioners. With him on the briefs was *Michael J. Esler*.

I. Franklin Hunsaker argued the cause for respondent. With him on the brief was *James G. Driscoll*.

Brian J. Martin argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Carr*, *Deputy Solicitor General Wallace*, *Anne S. Almy*, and *John T. Stahr*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The citizen suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2825, as amended, 42 U. S. C. § 6972 (1982 ed. and Supp. V), permits individuals to commence an action in district court to enforce waste disposal regulations promulgated under the Act. At least 60 days before commencing suit, plaintiffs must notify the alleged violator, the State, and the Environmental Protection Agency (EPA) of their intent to sue. 42 U. S. C. § 6972(b)(1).

**Michael Traynor* filed a brief for the Sierra Club et al. as *amici curiae* urging reversal.

This 60-day notice provision was modeled upon § 304 of the Clean Air Amendments of 1970, 84 Stat. 1706, as amended, 42 U. S. C. § 7604 (1982 ed.). Since 1970, a number of other federal statutes have incorporated notice provisions patterned after § 304.[1] In this case, we must decide whether compliance with the 60-day notice provision is a mandatory precondition to suit or can be disregarded by the district court at its discretion.

I

Petitioners own a commercial dairy farm located next to respondent's sanitary landfill. In April 1981, believing that the landfill operation violated standards established under RCRA, petitioners sent respondent written notice of their intention to file suit. A year later, petitioners commenced this action. On March 1, 1983, respondent moved for summary judgment on the ground that petitioners had failed to notify Oregon's Department of Environmental Quality (DEQ) and

[1] See, *e. g.*, § 505(b) of the Federal Water Pollution Control Act (Clean Water Act), 33 U. S. C. § 1365(b) (1982 ed.); § 310(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9659(d)(1) (1982 ed., Supp. V); § 105(g)(2) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U. S. C. § 1415(g)(2) (1982 ed.); § 12(b) of the Noise Control Act of 1972, 42 U. S. C. § 4911(b) (1982 ed.); § 16(b) of the Deepwater Port Act of 1974, 33 U. S. C. § 1515(b) (1982 ed.); § 1449(b) of the Safe Drinking Water Act, 42 U. S. C. § 300j–8(b) (1982 ed.); § 520(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1270(b) (1982 ed.); § 20(b) of the Toxic Substances Control Act, 15 U. S. C. § 2619(b); § 11(g)(2) of the Endangered Species Act of 1973, 16 U. S. C. § 1540(g)(2); § 23(a)(2) of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U. S. C. § 1349(a)(2) (1982 ed.); § 11(b)(1) of the Act to Prevent Pollution from Ships, 33 U. S. C. § 1910(b)(1) (1982 ed.); § 117(b) of the Deep Seabed Hard Mineral Resources Act, 30 U. S. C. § 1427(b) (1982 ed.); § 326(d) of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U. S. C. § 11046(d) (1982 ed., Supp. V); § 335(b) of the Energy Policy and Conservation Act, 42 U. S. C. § 6305(b) (1982 ed.); § 19(b) of the Natural Gas Pipeline Safety Act Amendments of 1976, 49 U. S. C. App. § 1686(b) (1982 ed.); and § 114(b) of the Ocean Thermal Energy Conversion Act of 1980, 42 U. S. C. § 9124(b) (1982 ed.).

the EPA of their intent to sue, as required by § 6972(b)(1). Respondent claimed that this failure to comply with the notice requirement deprived the District Court of jurisdiction. On March 2, 1983, petitioners notified the agencies of the suit.

The District Court denied respondent's motion. It reasoned that petitioners had cured any defect in notice by formally notifying the state and federal agencies on March 2, 1983. The agencies would then have 60 days to take appropriate steps to cure any violation at respondent's landfill. The court noted that the purpose of the notice requirement was to give administrative agencies an opportunity to enforce environmental regulations. In this case, neither the state nor the federal agency expressed any interest in taking action against respondent. Therefore, the court concluded that dismissing the action at this stage would waste judicial resources. Civ. No. 82–481 (Ore., Apr. 22, 1983).

After the action proceeded to trial, the District Court held that respondent had violated RCRA. The court ordered respondent to remedy the violation but refused to grant petitioners' motion for injunctive relief. Civ. No. 82–481JU (Sept. 30, 1985). In a later order, the District Court denied petitioners' request for attorney's fees. Petitioners appealed both rulings; respondent cross-appealed from the denial of its summary judgment motion.

The Court of Appeals for the Ninth Circuit concluded that petitioners' failure to comply with the 60-day notice requirement deprived the District Court of subject matter jurisdiction. Relying on the plain language of § 6972(b)(1), the Court of Appeals determined that permitting the plaintiff to proceed without giving notice would constitute "'judicial amendment'" of a clear statutory command. 844 F. 2d 598, 600 (1987), quoting *Garcia* v. *Cecos Int'l, Inc.*, 761 F. 2d 76, 78 (CA1 1985) (citation omitted). The Court of Appeals also determined that strict construction of the notice requirement would best further the goal of giving environmental agencies,

rather than courts, the primary responsibility for enforcing RCRA. 844 F. 2d, at 601. Therefore, the Court of Appeals remanded the action to the District Court with instructions to dismiss. We granted certiorari to resolve the conflict among the Courts of Appeals regarding the correct interpretation of the notice provision.[2] 489 U. S. 1077 (1989).

II

As we have repeatedly noted, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Section 6972(a)(1) permits any person to commence a civil action against an alleged violator of regulations established under RCRA "[except] as provided in subsection (b)." Subsection (b)(1) states:

> "(b) Actions prohibited.
>
> "No action may be commenced under paragraph (a)(1) of this section—
>
> "(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator [of the EPA]; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, stand-

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[2] The Courts of Appeals for the First and Seventh Circuits, as well as the Court of Appeals for the Ninth Circuit in this case, have construed the notice provision as a mandatory prerequisite for suit. See, *e. g.*, *Garcia* v. *Cecos Int'l, Inc.*, 761 F. 2d 76 (CA1 1985) (construing the notice provision in RCRA); *Highland Park* v. *Train*, 519 F. 2d 681, 690–691 (CA7 1975), cert. denied, 424 U. S. 927 (1976) (construing the notice provision in the Clean Air Amendments of 1970). The Court of Appeals for the Third Circuit reached a different conclusion, holding that the notice requirement is satisfied if the proper parties had notice in fact of the alleged violations more than 60 days before the suit was filed, see, *e. g.*, *Proffitt* v. *Bristol Commissioners*, 754 F. 2d 504, 506 (1985) (construing the notice provisions in the Clean Water Act and RCRA), or if the District Court stayed the proceedings for 60 days, see *Pymatuning Water Shed Citizens for Hygienic Environment* v. *Eaton*, 644 F. 2d 995, 996–997 (1981) (construing the notice provision in the Clean Water Act).

ard, regulation, condition, requirement, or order . . . ." 42 U. S. C. § 6972(b)(1) (1982 ed.).

The language of this provision could not be clearer. A citizen may not commence an action under RCRA until 60 days after the citizen has notified the EPA, the State in which the alleged violation occurred, and the alleged violator. Actions commenced prior to 60 days after notice are "prohibited." Because this language is expressly incorporated by reference into § 6972(a), it acts as a specific limitation on a citizen's right to bring suit. Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.

Petitioners do not contend that the language of this provision is ambiguous; rather, they assert that it should be given a flexible or pragmatic construction. Thus, petitioners argue that if a suit commenced without proper notice is stayed until 60 days after notice had been given, the District Court should deem the notice requirement to be satisfied. See *Pymatuning Water Shed Citizens for Hygienic Environment* v. *Eaton*, 644 F. 2d 995, 996–997 (CA3 1981). According to petitioners, a 60-day stay would serve the same function as delaying commencement of the suit: it would give the Government an opportunity to take action against the alleged violator and it would give the violator the opportunity to bring itself into compliance.

Whether or not a stay is in fact the functional equivalent of a precommencement delay, such an interpretation of §6972(b) flatly contradicts the language of the statute. Under Rule 3 of the Federal Rules of Civil Procedure, "[a] civil action is commenced by filing a complaint with the court." Reading § 6972(b)(1) in light of this Rule, a plaintiff may not file suit before fulfilling the 60-day notice requirement. Staying judicial action once the suit has been filed does not honor this prohibition. Congress could have excepted parties from complying with the notice or delay requirement; indeed, it carved out such an exception in its 1984 amendments to

RCRA. See, *e. g.*, 42 U. S. C. § 6972(b)(1)(A) (1982 ed., Supp. V) (abrogating the 60-day delay requirement when there is a danger that hazardous waste will be discharged). RCRA, however, contains no exception applicable to petitioners' situation; we are not at liberty to create an exception where Congress has declined to do so.

Petitioners further argue that under our decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 393 (1982), RCRA's 60-day notice provision should be subject to equitable modification and cure. In *Zipes*, we held that the timely filing of a charge of discrimination with the Equal Employment Opportunity Commission, as required under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e–5(e) (1982 ed.) ("[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . "), was not a jurisdictional prerequisite to suit but was subject to waiver, estoppel, and equitable tolling. 455 U. S., at 393. This decision does not help petitioners. First, as we noted in *Zipes*, both the language and legislative history of § 2000e–5(e) indicate that the filing period operated as a statute of limitations. 455 U. S., at 393–394. The running of such statutes is traditionally subject to equitable tolling. See, *e. g.*, *Honda* v. *Clark*, 386 U. S. 484, 501 (1967) (holding that where consistent with the overall congressional purpose, a "traditional equitable tolling principle" should be applied to a statutory limitations period). Unlike a statute of limitations, RCRA's 60-day notice provision is not triggered by the violation giving rise to the action. Rather, petitioners have full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days. The equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' "failure to take the minimal steps necessary" to preserve their claims.

Johnson v. *Railway Express Agency, Inc.*, 421 U. S. 454, 466 (1975).

Nor can we excuse petitioners' failure on the ground that "a technical reading [of § 6972] would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Zipes* v. *Trans World Airlines, Inc.*, *supra*, at 397, quoting *Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972). While the initial charge in a Title VII proceeding is normally filed by an aggrieved individual, see § 2000e–5(b), citizen suits under RCRA are like any other lawsuit, generally filed by trained lawyers who are presumed to be aware of statutory requirements. (Indeed, counsel for petitioners in this case admitted at oral argument that he knew of the notice provisions but inadvertently neglected to notify the state and federal agencies. Tr. of Oral Arg. 3–4.) Under these circumstances, it is not unfair to require strict compliance with statutory conditions precedent to suit.

Petitioners next contend that a literal interpretation of the notice provision would defeat Congress' intent in enacting RCRA; to support this argument, they cite passages from the legislative history of the first citizen suit statute, § 304 of the Clean Air Amendments of 1970, indicating that citizen suits should be encouraged. See S. Rep. No. 91–1196, pp. 36–37 (1970), 1 Senate Committee on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, pp. 436–437 (Comm. Print 1974). This reliance on legislative history is misplaced. We have held that "[a]bsent a clearly expressed legislative intention to the contrary," the words of the statute are conclusive. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S., at 108. Nothing in the legislative history of the citizen suit provision militates against honoring the plain language of the notice requirement. Nor is this one of the "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of

its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 242 (1989), quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982). Rather, the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits. See, *e. g.*, 116 Cong. Rec. 32927 (1970) (comments of Sen. Muskie); see also Note, Notice by Citizen Plaintiffs in Environmental Litigation, 79 Mich. L. Rev. 299, 301–307 (1980) (reviewing the legislative history of the Clean Air Amendments of 1970). Requiring citizens to comply with the notice and delay requirements serves this congressional goal in two ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. See *Gwaltney of Smithfield, Inc.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 60 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action"). In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts. See 116 Cong. Rec. 33104 (1970) (comments of Sen. Hart). Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, *supra*, at 60. This policy would be frustrated if citizens could immediately bring suit without involving federal or state enforcement agencies. Giving full effect to the words of the statute preserves the compromise struck by Congress.

Petitioners next assert that giving effect to the literal meaning of the notice provisions would compel "absurd or futile results." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940). In essence, petitioners make two arguments. First, petitioners, with *amici*,

contend that strictly enforcing the 60-day delay provision would give violators an opportunity to cause further damage or actually accomplish the objective that the citizen was attempting to stop. See, *e. g.*, *Save Our Sound Fisheries Assn.* v. *Callaway*, 429 F. Supp. 1136, 1142–1145 (RI 1977) (Army Corps of Engineers violated three environmental statutes in order to award dredging contract before citizen suit to enjoin dredging could commence). Similarly, they assert that courts would be precluded from giving essential temporary injunctive relief until 60 days had elapsed. Although we do not underestimate the potential damage to the environment that could ensue during the 60-day waiting period, this problem arises as a result of the balance struck by Congress in developing the citizen suit provisions. Congress has addressed the dangers of delay in certain circumstances and made exceptions to the required notice periods accordingly. See, *e. g.*, the Clean Water Act, as added, 86 Stat. 888, 33 U. S. C. §§ 1365(b) and 1317(a) (1982 ed.) (citizen suits may be brought immediately in cases involving violations of toxic pollutant effluent limitations); the Clean Air Amendments of 1970, 84 Stat. 1706, 42 U. S. C. § 7604(b) (1982 ed.) (citizen suits may be brought immediately in cases involving stationary-source emissions standards and other specified compliance orders). Moreover, it is likely that compliance with the notice requirement will trigger appropriate federal or state enforcement actions to prevent serious damage.

Second, petitioners argue that a strict construction of the notice provision would cause procedural anomalies. For example, petitioners contend that if a citizen notified Government agencies of a violation, and the agencies explicitly declined to act, it would be pointless to require the citizen to wait 60 days to commence suit. While such a result may be frustrating to the plaintiff, it is not irrational: as the Court of Appeals for the First Circuit noted, "[p]ermitting immediate suit ignores the possibility that a violator or agency may

change its mind as the threat of suit becomes more imminent." *Garcia* v. *Cecos Int'l, Inc.*, 761 F. 2d, at 82.

In sum, we conclude that none of petitioners' arguments requires us to disregard the plain language of § 6972(b). "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980). Therefore, we hold that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion. The parties have framed the question presented in this case as whether the notice provision is jurisdictional or procedural. In light of our literal interpretation of the statutory requirement, we need not determine whether § 6972(b) is jurisdictional in the strict sense of the term. See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 137 (1981) (BRENNAN, J., concurring in judgment) ("In 1937 the requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit, and in that sense a 'jurisdictional prerequisite'").

As a general rule, if an action is barred by the terms of a statute, it must be dismissed. Thus in *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984), we approved the District Court's determination that a claimant who failed to file a complaint within the 90-day statutory time period mandated by Title VII, 42 U. S. C. § 2000e–5(f)(1) (1982 ed.), had forfeited her right to pursue her claim. Accordingly, we rejected the Court of Appeals for the Eleventh Circuit's conclusion that under the "'generous'" interpretation required by the remedial nature of Title VII, claimant's filing of a right-to-sue letter had tolled the 90-day period. 466 U. S., at 149. But cf. *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 764–765, and n. 13 (1979) (where requiring dismissal and refiling "would serve no purpose other than the creation of an addi-

tional procedural technicality," a district court may comply with § 14(b) of the Age Discrimination in Employment Act of 1967, 81 Stat. 607, 29 U. S. C. § 633(b) (1982 ed.), by holding an action in abeyance during the pendency of a mandatory waiting period) (citation omitted). As we have noted, dismissal of an RCRA suit serves important federal goals, see *supra*, at 29. Indeed, the EPA, the federal agency charged with enforcement of RCRA, interprets the notice provision as requiring dismissal for noncompliance. Tr. of Oral Arg. 35–39. Such a remedy for actions filed in violation of § 6972(b)(1) will further judicial efficiency; courts will have no need to make case-by-case determinations of when or whether failure to fulfill the notice requirement is fatal to a party's suit.

Petitioners urge us not to require dismissal of this action after years of litigation and a determination on the merits. They contend that such a dismissal would unnecessarily waste judicial resources. We are sympathetic to this argument. The complex environmental and legal issues involved in this litigation have consumed the time and energy of a District Court and the parties for nearly four years. Nevertheless, the factors which have led us to apply decisions nonretroactively are not present in this case. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971). Our decision here does not establish a new rule of law; nor does it overrule clear past precedent on which litigants may have relied. Moreover, the statute itself put petitioners on notice of the requirements for bringing suit. Retroactive operation of our decision will further the congressional purpose of giving agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations. Nor will the dismissal of this action have the inequitable result of depriving petitioners of their "right to a day in court." *Id.*, at 108. Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards.

Accordingly, we hold that where a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Purporting to rely on "the plain language" of 42 U. S. C. § 6972(b) (1982 ed.), *ante*, at 31, the Court holds that a plaintiff's failure to comply with the 60-day prior notice provision of the Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6901 *et seq.* (1982 ed. and Supp. V), is necessarily fatal to his case. Yet even under the Court's preferred "literal reading" of the statute, *ante*, at 26, the sanction for a violation of the notice provision is anything but clear. Because requiring district courts to dismiss every action filed in violation of § 6972(b) ill serves both judicial economy and Congress' purposes in adopting RCRA, I dissent.

The relevant portion of the notice provision reads: "No action may be commenced under paragraph (a)(1) of this section—(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator [of the Environmental Protection Agency (EPA)]; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator . . . ." § 6972(b). There can be no doubt that the statute requires notice before a plaintiff can file a complaint. Nor is it open to debate that petitioners failed to notify the State and the EPA of the alleged violation 60 days before they filed a complaint in the District Court and thereby "commenced this action," *ante*, at 23, within the meaning of Federal Rule of Civil Procedure 3. The Court states these inescapable facts and, without any further analysis, concludes

that the sanction for violating § 6972(b) is dismissal.* The Court fails to recognize, however, that there is no necessary connection between a violation of that statute and any particular sanction for noncompliance.

That a plaintiff's failure to comply with statutory conditions precedent before bringing suit does not necessarily mandate dismissal of her action is apparent from our decision in *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979). In *Oscar Mayer*, we were asked to interpret § 14(b) of the Age Discrimination in Employment Act of 1967, 81 Stat. 607, as set forth in 29 U. S. C. § 633(b) (1982 ed.), which provides in part that "no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law." Because we found that "[t]he section is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination," 441 U. S., at 755, we held the 60-day notice requirement to be a "mandatory, not optional," precondition to suit. *Id.*, at 758. Compare *ante*, at 26 (holding that RCRA's 60-day notice provision "is a mandatory, not optional, condition precedent for suit").

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*The Court might be read to suggest that failure to comply with the 60-day notice provision deprives the court of subject-matter jurisdiction, thereby obligating a court to dismiss a case filed in violation of the notice provision no matter when the defendant raises the issue—indeed, regardless of whether the defendant does so. See *ante*, at 33 (when plaintiff fails to comply with notice provision, "the district court must dismiss the action"). As there is no dispute in this case that respondent timely raised the claim that petitioners had not complied with the notice provision, the question whether a defendant may waive the notice requirement is not before the Court, and any "resolution" of the question is necessarily dictum. In any event, I do not understand the Court to express any view on whether the notice requirement is waivable. See *ante*, at 31 ("[W]e need not determine whether § 6972(b) is jurisdictional in the strict sense of the term").

We nevertheless held that, rather than dismissing the suit, the court should hold it in abeyance for 60 days after the commencement of state proceedings, after which time the grievant could continue his federal suit. 441 U. S., at 764–765. We explained:

> "Suspension of proceedings is preferable to dismissal with leave to refile. . . . 'To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' *Love* v. *Pullman Co.*, [404 U. S. 522, 526–527 (1972)] (charge may be held in suspended animation during deferral period). For this reason, suspension pending deferral is the preferred practice in the federal courts." *Id.*, at 765, n. 13 (citations omitted).

To be sure, part of our reason for finding that a stay regime was preferable to dismissal and refiling was that laypersons filed many of the suits at issue, a circumstance that is arguably not present in RCRA cases. See *ante*, at 28 (suggesting, without evidence, that citizen suits under RCRA tend to be filed by represented parties). The point for present purposes, however, is simply that violation of a mandatory precondition to suit does not *necessarily* require dismissal of the suit. Where, as here, the statute specifies no sanction, factors extrinsic to statutory language enter into the decision as to what sanction is appropriate. See also *United States* v. *Robinson*, 361 U. S. 220, 223–224 (1960) (in determining whether court is deprived of jurisdiction over appeal when notice of appeal is not timely filed and when rule specifically provides that a court may not enlarge the period for filing notice of appeal, the court should make "a detailed examination of the language, judicial interpretations, and history of [the relevant rules]").

The Court's own analysis in this case makes clear that the purposes of the notice requirement would be served equally well by a court order staying proceedings for 60 days as by dismissal, and that the broader purposes of the citizen suit provision would be better served by the former. The Court identifies two purposes that Congress intended the notice requirement to serve: "First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Ante*, at 29 (quoting *Gwaltney of Smithfield, Inc.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 60 (1987)). All that is necessary to meet these concerns is a 60-day delay; whether it comes immediately before or immediately after the filing of the complaint is immaterial. Indeed, even the Court does not deny that stay and dismissal accomplish the same goals. See *ante*, at 26 (expressing no view on "[w]hether or not a stay is in fact the functional equivalent of a precommencement delay").

Furthermore, one of Congress' purposes in enacting the citizen suit provision, of which the notice requirement is a part, was to *encourage* citizen suits. See, *e. g.*, S. Rep. No. 91–1196, pp. 36–37 (1970) (legislative history of identical provision of Clean Air Amendments of 1970, 42 U. S. C. § 7604). Compare *ante*, at 29. Where Congress intends to facilitate citizen suits, and where the salutary purposes of the notice provision can be equally well served by a stay as by dismissal, a regime that requires the dismissal of a citizen suit that has "consumed the time and energy of a District Court and the parties for nearly four years," *ante*, at 32, and that has resulted in a judicial determination that respondent has violated RCRA, *ante*, at 24, is simply inconsistent with the will of Congress.

Perhaps recognizing that repeated invocations of the statute's "plain language" do nothing to advance its analysis, the Court also offers, in support of the proposition that "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed," *ante*, at 31, a citation to *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984). The absence in the Court's opinion of a quotation from *Baldwin County Welcome Center* in support of the proposition for which it is cited is no accident—the case does not stand for that proposition. In that case, the "issue before the Court of Appeals and before this Court [was] whether the filing of a right-to-sue letter with the District Court constituted the commencement of an action" within the meaning of Federal Rule of Civil Procedure 3. 466 U. S., at 150, n. 4. Finding "no persuasive justification" for the view that what constitutes a "complaint" under Rule 3 should be different in Title VII cases than in other federal litigation, the Court reinstated the District Court's finding that a right-to-sue letter was not a "complaint." *Id.*, at 150. Nowhere did the Court so much as hint that it was recognizing or establishing a general rule that any action barred by the terms of a statute must be dismissed even if the statutory goals animating the rule can otherwise be served.

The Court's reasoning reduces to an unexplained assertion followed by a citation to illusory authority. Because the Court's conclusion is not compelled by the language of the notice provision, and because Congress's twin purposes of fostering private enforcement of RCRA and of conserving judicial resources are better served by a rule permitting the district courts to stay actions such as this for 60 days rather than requiring dismissal, I dissent.

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1640. Argued October 30, 1989—Decided November 13, 1989

276 U. S. App. D. C. 130, 868 F. 2d 1285, affirmed by an equally divided Court.

William B. Schultz argued the cause for petitioners. With him on the briefs were *David C. Vladeck* and *Alan B. Morrison.*

Deputy Solicitor General Merrill argued the cause for respondents. With him on the brief for the federal respondents were *Acting Solicitor General Wallace, Acting Assistant Attorney General Schiffer, Michael R. Lazerwitz,* and *Douglas Letter. Stephen M. Shapiro, Andrew L. Frey, Kenneth S. Geller, Andrew J. Pincus, Clark M. Clifford, Robert A. Altman,* and *Robert P. Reznick* filed a brief for respondent Detroit Free Press, Inc. *John Stuart Smith, Gordon L. Lang, Corrine M. Yu,* and *Lawrence J. Aldrich* filed a brief for respondent Detroit News, Inc.*

**Paul L. Friedman, Anne D. Smith, Philip S. Anderson,* and *Peter G. Kumpe* filed a brief for Little Rock Newspapers, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Detroit Renaissance, Inc., et al. by *Herschel P. Fink, Richard E. Zuckerman,* and *David B. Jaffe;* for Newspaper Drivers & Handlers, Teamsters Local No. 372, et al. by *Gerry M. Miller;* for Union Leaders representing Detroit Free Press employees by *Bruce A. Miller;* and for Jane Daugherty et al. by *Barbara Harvey.*

Briefs of *amici curiae* were filed for the American Newspaper Publishers Association by *P. Cameron DeVore, Marshall J. Nelson,* and *W. Terry*

PER CURIAM.

The judgment of the Court of Appeals for the District of Columbia Circuit is affirmed by an equally divided Court.

JUSTICE WHITE took no part in the consideration or decision of this case.

Maguire; for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg, Walter Kamiat,* and *Laurence Gold;* and for James Blanchard et al. by *Richard C. Van Dusen.*

CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 87–1979. Argued October 3, 1989—Decided November 28, 1989*

Respondents, employees of petitioner railroads, were injured while working at petitioners' Virginia terminals, where coal was being loaded from railway cars to ships on navigable waters. The injuries to respondents in No. 87–1979, who were laborers doing housekeeping and janitorial services, occurred while they were undertaking one of their duties: cleaning spilled coal from loading equipment to prevent fouling. The injury to respondent in No. 88–127, a pier machinist, occurred when he was engaged in his primary duty of repairing coal loading equipment. Each respondent brought suit in state court under the Federal Employers' Liability Act. Petitioners challenged jurisdiction under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), which, *inter alia*, provides the exclusive remedy for an employee injured at a relevant situs while "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." 33 U. S. C. § 902(3). The trial courts dismissed the suits, concluding that each respondent was an employee covered by the LHWCA. The Supreme Court of Virginia consolidated the appeals of respondents in No. 87–1979 and reversed the dismissal of their cases, stating that the key question was whether an employee's activities had a realistically significant relationship to the loading of cargo on ships, and ruling that the activities of employees performing purely maintenance tasks did not. On the basis of this decision, the court then reversed the dismissal of the suit by respondent repairman in No. 88–127.

Held: Respondents were engaged in maritime employment within the meaning of § 902(3). Pp. 45–48.

(a) Since employment that is maritime within the meaning of § 902(3) includes not only the specified occupations or employees who physically handle cargo, but also land-based activity occurring within the relevant situs if it is an integral or essential part of loading or unloading a vessel, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249; *P. C. Pfeiffer*

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*Together with No. 88–127, *Norfolk & Western Railway Co.* v. *Goode*, also on certiorari to the same court.

Co. v. *Ford*, 444 U. S. 69; *Herb's Welding, Inc.* v. *Gray*, 470 U. S. 414, employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Someone who repairs or maintains such equipment is just as vital to, and as integral a part of, the loading process as the operator of the equipment, since, when machinery breaks down or becomes clogged because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to that process is not continuous, that he has other duties not integrally connected with the process, or that repair or maintenance is not always needed. The conclusion that the Act covers essential repair and maintenance is buttressed by the fact that every Federal Court of Appeals to have addressed the issue has reached this result, as has the Department of Labor, the agency charged with administering the Act. Pp. 45–48.

(b) Each of the respondents is covered by the LHWCA. It makes no difference that the particular kinds of repairs being done by respondent in No. 88–127 might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded, since the determinative consideration is that the ship loading process could not continue unless the equipment respondent worked on was operating properly and loading was, in fact, stopped while he made the repairs. Respondents in No. 87–1979 were also performing duties essential to the overall loading process, in light of testimony that, if coal which spills onto the loading equipment is not periodically removed, the equipment may become clogged and inoperable. Equipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work. P. 48.

No. 87–1979, 235 Va. 27, 365 S. E. 2d 742, and No. 88–127, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which MARSHALL and O'CONNOR, JJ., joined, *post*, p. 49. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 50.

William T. Prince argued the cause for petitioners in both cases. With him on the briefs were *Edward L. Oast, Jr.*, *John Y. Richardson, Jr.*, and *Joan F. Martin*.

Christine Desan Husson argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With her on the brief were *Acting Solicitor General Bryson*,

Deputy Solicitor General Shapiro, Allen H. Feldman, and *Charles I. Hadden.*

Bruce A. Wilcox argued the cause for respondents in both cases and filed a brief for respondent in No. 88–127. With him on the brief were *Richard J. Tavss* and *Ray W. King.* *C. Gerald Thompson* filed a brief for respondents in No. 87–1979.†

JUSTICE WHITE delivered the opinion of the Court.

Nancy J. Schwalb and William McGlone, respondents in No. 87–1979, were employees of petitioner Chesapeake and Ohio Railway Company (C & O), and were injured while working at petitioner's terminal in Newport News, Virginia, where coal was being loaded from railway cars to a ship on navigable waters. Robert T. Goode, respondent in No. 88–127, was injured while working for petitioner Norfolk and Western Railway Company (N & W) at its coal loading terminal in Norfolk, Virginia. If respondents' injuries are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. §§ 901–950 (1982 ed. and Supp. V), the remedy provided by that Act is exclusive and resort may not be had to the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60 (1982 ed. and Supp. V), which provides a negligence cause of action for railroad employees. The Supreme Court of Virginia held in both cases that the LHWCA was not applicable and that respondents could proceed to trial under the FELA. We reverse.

I

At the C & O facility, a mechanical conveyor-belt system transports coal from railroad hopper cars to colliers berthed at the piers. The loading process begins when a hopper car

†*Stephen A. Trimble, John M. Clifford,* and *John J. Delaney* filed a brief for the Association of American Railroads et al. as *amici curiae* urging reversal.

is rolled down an incline to a mechanical dumper which is activated by trunnion rollers and which dumps the coal through a hopper onto conveyor belts. The belts carry the coal to a loading tower from which it is poured into the hold of a ship. The trunnion rollers are located at each end of the dumper. Typically, some coal spills out onto the rollers and falls below the conveyor belts during the loading process. This spilled coal must be removed frequently to prevent fouling of the loading equipment. Respondents Nancy Schwalb and William McGlone both worked at C & O's terminal as laborers doing housekeeping and janitorial services. One of their duties was to clean spilled coal from the trunnion rollers and from underneath the conveyor belts. Both also performed ordinary janitorial services at the loading site. McGlone's right arm was severely injured while he was clearing away coal beneath a conveyor belt. Schwalb suffered a serious head injury when she fell while walking along a catwalk in the dumper area. At the time, she was on her way to clean the trunnion rollers.

At N & W's terminal, a loaded coal car is moved to the dumper where it is locked into place by a mechanical device called a "retarder." The dumper turns the car upside down. The coal falls onto conveyor belts and is delivered to the ship via a loader. Respondent Robert Goode was a pier machinist at N & W's terminal. His primary job was to maintain and repair loading equipment, including the dumpers and conveyor belts. Goode injured his hand while repairing a retarder on one of N & W's dumpers. Loading at that dumper was stopped for several hours while Goode made the repairs.

The three respondents commenced separate actions in Virginia trial courts under the FELA. Petitioners responded in each case by challenging jurisdiction on the ground that the LHWCA provided respondents' sole and exclusive remedy. See 33 U. S. C. § 905(a) (1982 ed., Supp. V). All three trial courts held evidentiary hearings and concluded that respondents were employees covered by the LHWCA. The suits

were dismissed and respondents appealed. The Supreme Court of Virginia consolidated the appeals of Schwalb and McGlone and reversed the dismissals. 235 Va. 27, 365 S. E. 2d 742 (1988).

Relying on one of its earlier decisions, *White* v. *Norfolk & Western R. Co.*, 217 Va. 823, 232 S. E. 2d 807 (1977), the court stated that the key question was whether an employee's activities had a realistically significant relationship to the loading of cargo on ships. 235 Va., at 31, 365 S. E. 2d, at 744. Pointing to expressions in our opinion in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977), that landward coverage of the LHWCA was limited to the "'essential elements'" of loading and unloading, the court concluded that "the 'essential elements' standard is more nearly akin to the 'significant relationship' standard we adopted in *White*" than the broader construction argued by C & O. 235 Va., at 33, 365 S. E. 2d, at 745. Applying the *White* standard, the court ruled that employees performing purely maintenance tasks should be treated no differently under the Act than those performing purely clerical tasks and held that Schwalb and McGlone were not covered. The court later dealt with the Goode case in an unpublished order, relying on its decision in *Schwalb* and reversing the trial court's judgment that an employee who repairs loading equipment is covered by the LHWCA. No. 870252 (Apr. 22, 1988), App. to Pet. for Cert. in No. 88–127, p. 17A.

Because the Supreme Court of Virginia's holding in these cases was contrary to the position adopted by Federal Courts of Appeals, see, *e. g.*, *Harmon* v. *Baltimore & Ohio R. Co.*, 239 U. S. App. D. C. 239, 244–245, 741 F. 2d 1398, 1403–1404 (1984); *Sea-Land Services, Inc.* v. *Director, Office of Workers' Compensation Programs*, 685 F. 2d 1121, 1123 (CA9 1982) *(per curiam)*; *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750, 755–756 (CA5 1981); *Garvey Grain Co.* v. *Director, Office of Workers' Compensation Programs*, 639 F. 2d 366, 370 (CA7 1981) *(per curiam)*; *Prolerized New England*

Co. v. *Benefits Review Board*, 637 F. 2d 30, 37 (CA1 1980), we granted certiorari to resolve the conflict. 489 U. S. 1009–1010 (1989).

II

For the LHWCA to apply, the injured person must be injured in the course of his employment, 33 U. S. C. § 902(2) (1982 ed.); his employer must have employees who are employed in maritime employment, § 902(4); the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," 33 U. S. C. § 903(a) (1982 ed., Supp. V); and the employee who is injured within that area must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—" certain enumerated categories of employees, § 902(3). It is undisputed that the first three of these requirements are satisfied in these cases. The issue is whether the employees were engaged in maritime employment within the meaning of § 902(3).

The employment that is maritime within the meaning of § 902(3) expressly includes the specified occupations but obviously is not limited to those callings. *Herb's Welding, Inc.* v. *Gray*, 470 U. S. 414, 423, n. 9 (1985); *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69, 77–78, n. 7 (1979). The additional reach of the section has been left to the courts sitting in review of decisions made in the Department of Labor, which is charged with administering the Act. In the course of considerable litigation, including several cases in this Court, it has been clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel. This is a sensible construction

of § 902(3) when read together with § 903(a), particularly in light of the purpose of the 1972 amendments to the LHWCA which produced those sections.

Prior to 1972, the Act applied only to injuries occurring on navigable waters. Longshoremen loading or unloading a ship were covered on the ship and the gangplank but not shoreward, even though they were performing the same functions whether on or off the ship. Congress acted to obviate this anomaly: § 903(a) extended coverage to the area adjacent to the ship that is normally used for loading and unloading, but restricted the covered activity within that area to maritime employment. Pub. L. 92–576, 86 Stat. 1251. There were also specific exclusions in both § 902(3) and § 903; those exclusions were expanded in 1984. See Pub. L. 98–426, § 2(a), 98 Stat. 1639.

In *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, we held that the 1972 amendments were to be liberally construed and that the LHWCA, as amended, covered all those on the situs involved in the essential or integral elements of the loading or unloading process. *Id.*, at 267, 268, 271. But those on the situs not performing such tasks are not covered. *Id.*, at 267. This has been our consistent view. *P. C. Pfeiffer Co.* v. *Ford*, *supra*, held that workers performing no more than one integral part of the loading or unloading process were entitled to compensation under the Act. *Id.*, at 82. We also reiterated in *Herb's Welding, Inc.* v. *Gray*, *supra*, that the maritime employment requirement as applied to land-based work other than longshoring and the other occupations named in § 902(3) is an occupational test focusing on loading and unloading. Those not involved in those functions do not have the benefit of the Act. *Id.*, at 424.

In the cases before us, respondents were connected with the loading process only by way of the repair and maintenance services that they were performing when they were injured. There is no claim that if those services are not

maritime employment, respondents are nevertheless covered by the LHWCA. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 272–274. Only if the tasks they were performing are maritime employment, are respondents in these cases covered by the Act.

Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires. Coverage is not limited to employees who are denominated "longshoremen" or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

Our conclusion that repair and maintenance to essential equipment are reached by the Act is buttressed by the fact that every Court of Appeals to have addressed the issue has arrived at the same result. See the cases cited *supra*, at 44–45. As evidenced by the *amicus* brief of the United States filed in these cases, the Secretary of Labor also agrees that such repair and maintenance employees are engaged in maritime employment within the meaning of § 902(3), and the Benefits Review Board also has consistently taken this view, see, *e. g.*, *Wuellet* v. *Scappoose Sand & Gravel Co.*, 18 BRBS 108, 110–111 (1986); *De Robertis* v. *Oceanic Container Serv-*

ice, Inc., 14 BRBS 284, 286–287 (1981); *Cabezas* v. *Oceanic Container Service, Inc.*, 11 BRBS 279, 283–288 (1979), and cases cited therein.

III

Applying the standard expressed in our cases, we conclude that each of the respondents is covered by the LHWCA. The Supreme Court of Virginia held that Goode was not covered because in its view repair of equipment essential to the loading process was not maritime employment. This was error. It makes no difference that the particular kind of repair Goode was doing might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is that the ship loading process could not continue unless the retarder that Goode worked on was operating properly. It is notable that the loading actually was stopped while Goode made the repairs and that one of his supervisors apparently expressed the desire that Goode hurry up so that the loading could continue.

Respondents Schwalb and McGlone also were performing duties essential to the overall loading process. There is testimony in the record that if the coal which spills onto the rollers is not periodically removed, the rollers may become clogged and the dumper will become inoperable. App. 57, 92. The same is true of the coal that falls beneath the conveyor belts. *Ibid.* Testimony indicated that a buildup of such coal could eventually foul the conveyors and cause them to be shut down. Equipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work. Employees who are injured on the situs while performing these essential functions are covered by the LHWCA.

IV

For the reasons given above, the judgments of the Supreme Court of Virginia are reversed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

Although I join the opinion of the Court, I write separately to emphasize that I do not understand our decision as in any way repudiating the "amphibious workers" doctrine this Court articulated in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 272–274 (1977). We hold today that respondents Schwalb, McGlone, and Goode are covered by the LHWCA since they were injured while performing tasks essential to the process of loading ships. In light of *Northeast Marine Terminal Co.*, however, it is not essential to our holding that the employees were injured while actually engaged in these tasks. They are covered by the LHWCA even if, at the moment of injury, they had been performing other work that was not essential to the loading process.

As the Court explained in *Northeast Marine Terminal Co.*, Congress, in amending the LHWCA in 1972, intended to solve the problem that under the pre-1972 Act employees would walk in and out of LHWCA coverage during their workday, if they performed some tasks over water and other tasks ashore. Congress wanted

> "to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity." *Id.*, at 273.

Later, in *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979), we said that the "crucial factor" in determining LHWCA coverage "is the nature of the activity to which a worker *may be assigned.*" *Id.*, at 82 (emphasis added). Although the employees in *Pfeiffer* were actually engaged in longshoring work

at the time of their injuries, we noted: "Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal Co.* . . . that a worker is covered if he spends some of his time in indisputably longshoring operations . . . ." *Id.*, at 83, n. 18.

To suggest that a worker like Schwalb, McGlone, or Goode, who spends part of his time maintaining or repairing loading equipment, and part of his time on other tasks (even general cleanup, or repair of equipment not used for loading), is covered only if he is injured while engaged in the former kind of work, would bring the "walking in and out of coverage" problem back with a vengeance. We said in *Northeast Marine Terminal Co.* that "to exclude [a worker] from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U. S., at 274.

I join the Court's opinion on the specific understanding that it casts no shadow on the continuing validity of *Northeast Marine Terminal Co.*

JUSTICE STEVENS, concurring in the judgment.

Had this case arisen in 1977, I would have subscribed to the interpretation of the Longshore and Harbor Workers' Compensation Act that the Supreme Court of Virginia adopted in *White* v. *Norfolk & Western R. Co.*, 217 Va. 823, 232 S. E. 2d 807, cert. denied, 434 U. S. 860 (1977). I continue to believe that the text of the Act "merely provides coverage for people who do the work of longshoremen and harbor workers—amphibious persons who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships," and that the Act's history in no way clouds the text's plain import. See *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 328, 342 (1983) (STEVENS, J., dissenting). The *White* opinion reaches a similar conclusion. See *White*, 217 Va., at 833, 232 S. E. 2d, at 813 (employing a "direct involvement" test).

Yet, as the majority correctly observes, *ante*, at 44–45, the Federal Courts of Appeals have consistently interpreted the Act's status requirement to encompass repair and maintenance workers. That uniform and consistent course of decision has established a reasonably clear rule of law that I feel bound to respect. Cf. *Commissioner* v. *Fink*, 483 U. S. 89, 102–103 (1987) (STEVENS, J., dissenting). I therefore concur in the Court's judgment.

UNITED STATES *v.* SPERRY CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88–952. Argued October 10, 1989—Decided November 28, 1989

Prior to the 1979 seizure of the United States Embassy in Tehran, appellees, an American parent corporation and its wholly owned subsidiary (hereinafter Sperry), entered into contracts with the Government of Iran. After the Embassy seizure, Sperry filed suit for claims against Iran in a Federal District Court and obtained a prejudgment attachment of Iranian assets. Subsequently, the United States and Iran entered into the Algiers Accords, which, *inter alia*, established the Iran-United States Claims Tribunal (Tribunal) to arbitrate Americans' claims against Iran, specified that Tribunal awards are final, binding, and enforceable in the courts of any nation, and placed $1 billion of Iranian assets in a Security Account for the payment of awards to the Federal Reserve Bank of New York (FRB) and thence to claimants. After Executive Orders implementing the Accords invalidated Sperry's attachment and prohibited it from further pursuing its claim in American courts, it filed a claim with the Tribunal and ultimately entered into a settlement agreement whereby Iran promised to pay it $2.8 million, which agreement was recorded as an award of the Tribunal. Congress then enacted § 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, which requires the FRB to deduct from any Tribunal award and to pay into the United States Treasury before remitting the award to the claimant a percentage of the award "as reimbursement to the . . . Government for expenses incurred in connection with the arbitration of claims . . . before [the] Tribunal and the maintenance of the Security Account." When the FRB so deducted a percentage of Sperry's award, Sperry renewed a suit it had previously filed in the Claims Court, arguing that the deduction authorized by § 502 was unconstitutional. The court rejected the claim and dismissed the suit, but the Court of Appeals reversed.

Held: Section 502 is not unconstitutional. Pp. 59–66.

(a) Section 502 does not violate the Just Compensation Clause of the Fifth Amendment. Sperry has not identified any of its property that was taken without just compensation. No taking occurred because Sperry's prejudgment attachment was nullified by the Executive Orders implementing the Accords, since *Dames & Moore* v. *Regan*, 453 U. S. 654, 674, n. 6, held that American litigants against Iran had no property interest in such attachments. Nor did Sperry suffer the deprivation of its claim against Iran, since it presented the claim to the Tribunal and

settled it for a substantial sum, and now makes no claim that the award was less than could have been recovered in ordinary litigation or that being forced to take the lesser amount was an unconstitutional taking. Moreover, the deduction is not a taking but is a reasonable "user fee" assessed against claimants before the Tribunal and intended to reimburse the Government for its costs in connection with the Tribunal. The amount of a user fee need not be precisely calibrated to the use that a party makes of governmental services, and, on the facts of this case, the § 502 deduction is not so clearly excessive as to belie its purported character as a user fee. Sperry's contention that it did not benefit from the procedures established by the Accords is rejected, since those procedures assured Sperry that its award could be enforced in the courts of any nation and actually paid in this country, whereas, absent those procedures, Sperry would have had no assurance that it could have pursued its action to judgment or that a judgment would have been readily collectible. It is not dispositive that the award was more the result of private negotiations than Tribunal procedures, since Sperry filed its claim with the Tribunal and had a formal award entered, and since Sperry could be required to pay a charge for available governmental services that it never actually used. Pp. 59–64.

(b) Section 502 does not violate the Due Process Clause of the Fifth Amendment. The retroactive application of the § 502 deductions to awards, such as Sperry's, made prior to the statute's enactment is justified by a rational legislative purpose: ensuring that all successful claimants before the Tribunal are treated alike in that all have to contribute to the Tribunal's costs. If § 502's application had been prospective only, those costs would have fallen disproportionately on claimants whose awards were delayed, and claimants who obtained awards prior to enactment would have enjoyed a windfall by avoiding contribution. Nor does § 502 violate the Clause's equal protection component by failing to assess a user fee against all claimants before the Tribunal, since Congress could have rationally concluded that only successful claimants realize a benefit sufficient to justify assessment of a fee and that assessing all claimants would undesirably deter small or uncertain claims. Pp. 64–66.

(c) This Court will not reach the merits of Sperry's argument that § 502 was enacted in violation of the Origination Clause of Article I, § 7, of the Constitution. The question whether Origination Clause claims present nonjusticiable political questions is presently pending before the Court, see *United States* v. *Munoz-Flores*, cert. granted, *post*, p. 808, and it would be inappropriate to address Sperry's claim before the threshold justiciability question is decided. Furthermore, even assuming that Origination Clause claims are justiciable, this Court would bene-

fit from the views of the Court of Appeals, which found it unnecessary to address the Origination Clause issue. P. 66.

853 F. 2d 904, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Acting Solicitor General Bryson, Assistant Attorney General Bolton, Edwin S. Kneedler, David M. Cohen, Douglas N. Letter,* and *Abraham D. Sofaer.*

John D. Seiver argued the cause for appellees. With him on the brief were *Alan Raywid* and *Susan Paradise Baxter.**

JUSTICE WHITE delivered the opinion of the Court.

Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, 99 Stat. 438, note following 50 U. S. C. § 1701 (1982 ed., Supp. V), requires the Federal Reserve Bank of New York to deduct and pay into the United States Treasury a percentage of any award made by the Iran–United States Claims Tribunal in favor of an American claimant before remitting the award to the claimant. We are asked to consider in this case whether § 502 violates the Just Compensation Clause or Due Process Clause of the Fifth Amendment[1] or the Origination Clause of Article I, § 7.[2]

I

Appellees Sperry Corporation and Sperry World Trade, Inc. (hereinafter Sperry),[3] are American corporations that

*Briefs of *amici curiae* urging affirmance were filed for Chevron Corp. by *Charles G. Cole;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Edward J. Connor, Jr.*

[1] "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5.

[2] "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U. S. Const., Art. I, § 7, cl. 1.

[3] Sperry World Trade, Inc., is a wholly owned subsidiary of Sperry Corporation. Subsequent to the commencement of this action, Sperry

entered into contracts with the Government of Iran prior to the seizure of the United States Embassy in Tehran on November 4, 1979. The details of the seizure of the Embassy and diplomatic personnel and the ensuing diplomatic crisis want no repetition here. We need address only the means eventually established by the Governments of the United States and Iran to resolve claims by American companies against Iran.

On November 14, 1979, President Carter issued Executive Order No. 12170, blocking the removal or transfer of all property of the Government of Iran subject to American jurisdiction. 3 CFR 457 (1980). One day later, the Secretary of the Treasury issued regulations invalidating any attachment affecting Iranian property covered by the Executive Order unless the attachment was licensed by the Secretary. 31 CFR § 535.203(e) (1980). The regulations provided that any such license could be "amended, modified, or revoked at any time." § 535.805. On November 26, 1979, the President granted a general license authorizing judicial proceedings against Iran but not the "entry of any judgment or of any decree or order of similar or analogous effect . . . ." § 535.504(b)(1). A subsequently issued regulation made clear that the President's license authorized prejudgment attachments. § 535.418.

As part of the resolution of the diplomatic crisis, the United States and Iran entered into an agreement embodied in two declarations of the Government of Algeria commonly referred to as the Algiers Accords (hereinafter the Accords). App. 29–42. The Accords provided for the establishment in The Hague of an international arbitral tribunal, known as the Iran–United States Claims Tribunal (hereinafter the Tribunal), to hear claims brought by Americans against the Government of Iran. The establishment of the Tribunal was to

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Corporation merged with Burroughs Corporation. The successor corporation was renamed as UNISYS Corporation. Brief for Appellees 1, n. 1.

preclude litigation by Americans against Iran in American courts, so the United States undertook to terminate such legal proceedings, unblock Iranian assets in the United States, and nullify all attachments against those assets. *Id.*, at 30. To implement the Accords, President Carter issued a series of Executive Orders on January 19, 1981, revoking all licenses permitting the exercise of "any right, power, or privilege" with respect to Iranian funds and annulling all non-Iranian interests in Iranian assets acquired after the blocking order. Exec. Orders Nos. 12276–12285, 3 CFR 104–118 (1981). On February 24, 1981, President Reagan issued an Executive Order suspending all claims that "may be presented to the . . . Tribunal" and providing that such claims "shall have no legal effect in any action now pending in any court of the United States." Exec. Order No. 12294, 3 CFR 139 (1981). This Court upheld the revocation of the licenses and the suspension of the claims in *Dames & Moore* v. *Regan*, 453 U. S. 654 (1981).

Prior to the Accords, Sperry had filed suit against Iran in the United States District Court for the District of Columbia and had obtained a prejudgment attachment of blocked Iranian assets, but the Executive Orders sustained in *Dames & Moore* invalidated that attachment and prohibited Sperry from further pursuing its claims against Iran in any American courts. Sperry therefore filed a claim against Iran with the Tribunal and also began settlement negotiations with Iran. In February 1982, Sperry and Iran reached an agreement requiring the payment by Iran to Sperry of $2.8 million. The Government of Iran gave the settlement final approval on July 8, 1982.

Sperry and Iran then filed a joint application with the Tribunal, which was granted, to have the settlement entered as an "Award on Agreed Terms." The entry of the settlement provided Sperry with a significant benefit, for it gave the settlement agreement the status of an award by the Tribunal, and under the Accords, all awards of the Tribunal are "final

and binding" and are "enforceable . . . in the courts of any nation in accordance with its laws." App. 40. The entry of the settlement also enabled Sperry to make use of the mechanism established by the Accords and the implementing Executive Orders for the payment of arbitral awards. As part of the Accords, $1 billion of the unblocked Iranian assets had been placed in a Security Account in the Bank of England for the payment of awards. *Id.*, at 33. Awards made by the Tribunal in favor of American claimants are paid from the Security Account to the Federal Reserve Bank of New York, which then pays the awards to the claimants. See 47 Fed. Reg. 25243 (1982).

We come now to the heart of this dispute. The Accords provided that "[t]he expenses of the Tribunal shall be borne equally by the two governments." App. 41. On June 7, 1982, the Department of the Treasury issued a "Directive License" requiring the Federal Reserve Bank of New York to deduct 2% from each award certified by the Tribunal and to pay the deducted amount into the Treasury "to reimburse the United States Government for costs incurred for the benefit of U. S. nationals who have claims against Iran." 47 Fed. Reg. 25243 (1982). When the Federal Reserve Bank of New York received Sperry's award, it deducted the 2% charge over Sperry's protest, deposited the charge in the Treasury, and paid Sperry the balance of its award.

Sperry filed suit in the United States Claims Court, contending that the 2% charge was unconstitutional and was not (as the United States argued) authorized by the Independent Offices Appropriation Act, 1952 (IOAA), 65 Stat. 290, 31 U. S. C. § 483a (1976 ed.).[4] The Claims Court held in an oral ruling on May 1, 1985, that the Directive License violated IOAA. App. to Juris. Statement 26a–51a. Congress reacted swiftly by enacting § 502, which specifically requires the assessment of a charge against successful American

[4] Title 31 was recodified in 1982, and IOAA is now to be found at 31 U. S. C. § 9701 (1982 ed.).

claimants before the Tribunal and directs the Federal Reserve Bank of New York to deduct from Tribunal awards paid out of the Security Account an amount equal to 1½% of the first $5 million and 1% of any amount over $5 million. Section 502(a) states that these charges are to be deducted "as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before [the] Tribunal and the maintenance of the Security Account established pursuant to the [Accords]." Congress made § 502 effective retroactive to June 7, 1982, the date on which the Treasury had issued the Directive License struck down by the Claims Court. See § 502(d).

Sperry renewed its challenge to the deduction in the Claims Court, arguing that the 1½% deduction authorized by § 502 was unconstitutional. The Claims Court rejected the constitutional claims and dismissed Sperry's suit. 12 Cl. Ct. 736 (1987). The Court of Appeals for the Federal Circuit reversed and held that § 502 was unconstitutional as it caused a taking of Sperry's private property without just compensation. 853 F. 2d 904 (1988). The Court of Appeals likened the 1½% deduction by the Federal Reserve Bank of New York to the permanent physical occupation by the Government of private property which, this Court held in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 441 (1982), is always a "taking" requiring just compensation. The Court of Appeals was unmoved by the United States' argument that there was no taking given the benefits that Sperry had obtained from the Tribunal: "[W]e do not see the benefit of the Tribunal to Sperry when prior to the Accords it had secured the attachment of Iranian assets sufficient to cover its eventual award and, had the President not suspended American claims, would have had no need for the Tribunal." 853 F. 2d, at 908.

The United States invoked our appellate jurisdiction under the version of 28 U. S. C. § 1252 (1982 ed.) in effect before its

amendment in 1988.[5] We noted probable jurisdiction, 489 U. S. 1009 (1989), and we now reverse.

II

Sperry argues that the deduction is a part of Congress' scheme to shift to American claimants against Iran those costs of settling the diplomatic crisis that should have been borne by the Nation as a whole. As we see it, however, Sperry has not identified any of its property that was taken without just compensation. To the extent the Court of Appeals' decision may be read as concluding that Sperry suffered a taking of its property because its prejudgment attachment against Iranian assets was nullified by the Executive Orders implementing the Accords, see 853 F. 2d, at 907, that conclusion is incorrect; we held in *Dames & Moore* v. *Regan*, 453 U. S., at 674, n. 6, that American litigants against Iran had no property interest in such attachments. Nor did Sperry suffer the deprivation of its claim against Iran. Sperry presented its claim to the Tribunal and settled the claim for a substantial sum.[6] And we note that Sperry makes no claim that the gross amount of the award was less

[5] Section 1252 permitted a direct appeal to this Court from "an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States . . . is a party." Congress eliminated most of this Court's appellate jurisdiction, including that based on § 1252, in Public Law 100–352, 102 Stat. 662, which was enacted on June 27, 1988. However, § 7 of Public Law 100–352 provides that the statute "shall take effect ninety days after the date of the enactment of this Act," *i. e.*, on September 25, 1988, and shall not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Id.*, at 664. The judgment of the Court of Appeals was entered on August 10, 1988, before the effective date of Public Law 100–352. The appeal is therefore proper. See also *Duquesne Light Co.* v. *Barasch*, 488 U. S. 299, 307, n. 4 (1989).

[6] Sperry's ability to pursue its claim against Iran in another forum distinguishes this case from *Gray* v. *United States*, 21 Cl. Ct. 340 (1886). In the treaty at issue in *Gray*, the United States canceled American claims against France altogether. *Id.*, at 393.

than what would have been recovered in ordinary litigation and that being forced to take the lesser amount was an unconstitutional taking of property. The case thus turns only on the constitutionality of the deduction.

As for the deduction itself, the United States urges that it is not a taking at all but is a reasonable "user fee" assessed against claimants before the Tribunal and intended to reimburse the United States for its costs in connection with the Tribunal. Sperry responds that the § 502 charge cannot be upheld as a user fee because there has been no showing that the amount of the deduction approximates the cost of the Tribunal to the United States or bears any relationship to Sperry's use of the Tribunal or the value of the Tribunal's services to Sperry. None of Sperry's submissions is persuasive.

Section 502(a) specifically states that the deductions are made as "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before [the] Tribunal and the maintenance of the Security Account . . . ." Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of § 502 belies its express language before we conclude that the deductions are actually takings. Cf. *Pittsburgh* v. *Alco Parking Corp.*, 417 U. S. 369, 375–376 (1974). That burden has not been met.

This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied." *Massachusetts* v. *United States*, 435 U. S. 444, 463, n. 19 (1978). In that case, the Court upheld a flat registration fee assessed by the Federal Government on civil aircraft, including aircraft owned by the States, against a challenge that the fee

violated the principle of intergovernmental tax immunity. In holding that the registration charge could be upheld because it was a user fee rather than a tax, the Court rejected Massachusetts' argument that the "amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways." *Id.*, at 463. The Court recognized that when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we declined to impose a requirement that the Government "give weight to every factor affecting appropriate compensation for airport and airway use," *id.*, at 468.[7]

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[7] Sperry urges, however, that *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266 (1987), compels invalidation of the deduction here. In that case, the Court rejected Pennsylvania's argument that flat truck registration fees and axle taxes did not violate the Commerce Clause because they were imposed as user fees to reimburse Pennsylvania for the costs of highway maintenance. The Court stated that "Pennsylvania's flat taxes . . . discriminate against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the State, and they do not even purport to approximate fairly the cost or value of the use of Pennsylvania's roads." *Id.*, at 290.

The reasoning of *American Trucking Assns.* cannot be extended outside the context of the Commerce Clause. The Court there was faced with particular constitutional restrictions on fees and taxes not present in this case, that a fee charged by a State not discriminate against out-of-state vehicles and not place an undue burden on interstate commerce. The flat taxes were objectionable because, even though they were facially neutral, their effect was to subject out-of-state vehicles, which traveled on average much fewer miles inside Pennsylvania than did in-state vehicles, to a much higher charge per mile traveled. The taxes failed what we have described as the "internal consistency" requirement of the Commerce Clause. *Id.*, at 282–287; see also *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue*, 483 U. S. 232, 247 (1987). There is no similarly exacting requirement under the Just Compensation Clause. On the contrary, the Just Compensation Clause "has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received" in determining whether a "taking" has occurred. *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 491, n. 21 (1987).

The deductions authorized by § 502 are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee. Cf. *FCC* v. *Florida Power Corp.*, 480 U. S. 245, 253 (1987); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980).[8] We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1½% does not qualify as a "taking" by any standard of excessiveness. This was obviously the judgment of Congress and we abide by it.[9]

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[8] In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, the Court struck down a Florida statute appropriating interest on funds deposited into a court registry by an interpleader complainant. Florida law provided for both the deduction of a small percentage of the interpleader funds as a fee for services rendered by the clerk of the court and the deduction of interest earned on the funds. "It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged . . . and described specifically . . . as a fee 'for services' by the clerk's office." 449 U. S., at 162. We failed to discern any justification for the deduction of the interest other than the bare transfer of private property to the county. We expressed "no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders," *id.*, at 165, a situation more analogous to the case at bar.

[9] Sperry argues, however, that we should not even consider the amount deducted by the Federal Reserve Bank of New York because the deduction was akin to a "permanent physical occupation" of its property and therefore was a *per se* taking requiring just compensation, regardless of the extent of the occupation or its economic impact. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 441 (1982). The Court of Appeals agreed with Sperry. 853 F. 2d 904, 906–907 (CA Fed. 1988). It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Sperry complains that the United States has taken its property by charging it for the use of procedures that it has been forced to use, or at least that it would rather not have used. But as we have explained *supra*, at 60–61, a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services. "A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost . . . ." *Massachusetts* v. *United States*, 435 U. S., at 462 (plurality opinion). Though we may accept Sperry's word that it would have preferred to pursue its action against Iran in the familiar and proximate federal district courts, we cannot accept its contention that it did not benefit in any way from the procedures established by the Accords. The fact is that Sperry did benefit directly from the existence and functions of the Tribunal. The Accords that established the Tribunal and the Executive Orders that implemented the Accords assured Sperry that any award made to it, whether as the result of a settlement or otherwise, could be enforced in the courts of any nation and actually paid in this country. Had the President not agreed to the establishment of the Tribunal and the Security Account, Sperry would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible. As it was, Sperry filed its claim with the Tribunal, arrived at a settlement with Iran, and had the settlement entered as a formal award by the Tribunal, which was paid in full except for the deduction at issue in this case.

It is not at all dispositive that the award to Sperry was more the result of private negotiations between Sperry and Iran than the Tribunal procedures placed at Sperry's disposal. Sperry filed its claim with the Tribunal and had a formal award entered. Furthermore, Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal; Sperry received the "benefit from [the Tribunal] in the sense that the services are available for [its] use." *Massachusetts* v. *United States*, *supra*,

at 468; see also *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U. S. 261, 266–267 (1935). Had Sperry's negotiations with Iran failed, it would have then had the opportunity to use the hearing rooms, translation facilities, and facilities for service of documents made available through the Tribunal and the State Department. The Tribunal made available to claimants such as Sperry sufficient benefits to justify the imposition of a reasonable user fee.

III

We turn next to Sperry's due process claims. Sperry urges that § 502 violates the Due Process Clause because the deductions apply to awards, such as Sperry's, made by the Tribunal prior to the enactment of the statute. Our standard of review is settled:

> "[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 730 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976)) (citation omitted).

We agree with the United States that the retroactive application of § 502 is justified by a rational legislative purpose. Retroactive application of § 502 ensures that all successful claimants before the Tribunal are treated alike in that all have to contribute toward the costs of the Tribunal. If Congress had made the application of § 502 prospective only, the costs of the Tribunal would have fallen disproportionately on the claimants whose awards, for whatever reason, were

delayed, and Congress might have had to increase the percentage charge on those claimants to recoup a sufficient portion of the Federal Government's costs. Claimants who were fortunate enough to obtain awards prior to the enactment of the statute would have obtained a windfall by avoiding contribution. It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them. Cf. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, *supra*, at 730; *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, at 18.

Nor does § 502 violate the equal protection component of the Due Process Clause[10] because it assesses a user fee only against claimants who have actually received an award from the Tribunal and not against all claimants before the Tribunal. The classification implicitly made by § 502 neither burdens fundamental constitutional rights nor creates suspect classifications, so again our standard of review is that of rationality. See *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 174–175 (1980). Congress could have rationally concluded that only those who are successful before the Tribunal realize a benefit therefrom sufficient to justify assessment of a fee. Congress could also have determined that assessing a user fee against all claimants would undesirably deter those whose claims were small or uncertain of success from presenting them to the Tribunal. This case is wholly unlike *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), where the Court was unable to discern any legitimate interest that was served by a requirement that the State be reimbursed for the cost of criminal trial transcripts by incarcerated prisoners unsuccessful in their appeals but not by other indigent appellants, even other unsuccessful ones who had not been incarcerated. Here the costs are imposed on only the successful claimants, not, as in *Rinaldi*, only the unsuccessful ones, a situation presenting entirely different considerations.

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[10] See *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

Moreover, as discussed *supra*, at 65, a sensible distinction may be made between successful claimants who have completed the Tribunal proceedings and all other claimants.

IV

As a final ground for affirming the judgment below, Sperry relies on an argument presented to, but not passed on by, the Court of Appeals, *i. e.*, that § 502 was enacted in violation of the Origination Clause of Article I, § 7, which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Sperry refers us to the legislative history of the Foreign Relations Authorization Act, which indicates that § 502 was added as a Senate amendment to a bill that contained no revenue-raising provisions when it originated in the House.

We do not reach the merits of this contention. In another case to be argued this Term, we have directed the parties to brief whether claims based on the Origination Clause present nonjusticiable political questions. See *United States* v. *Munoz-Flores*, cert. granted, *post*, p. 808; cf. *INS* v. *Chadha*, 462 U. S. 919, 940–943 (1983); *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Although this Court has on prior occasions appeared to address the merits of Origination Clause claims, see, *e. g.*, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143 (1911); *Millard* v. *Roberts*, 202 U. S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U. S. 196 (1897), it would be inappropriate for us to do so now, before we decide the threshold question of justiciability in *Munoz-Flores*. Furthermore, even assuming that Origination Clause claims are justiciable, we would benefit from the views of the Court of Appeals, which found it unnecessary to address the Origination Clause issue. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BREININGER *v.* SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–124. Argued October 10, 1989—Decided December 5, 1989

Pursuant to a multiemployer collective-bargaining agreement, respondent union operates a hiring hall through which it refers both members and nonmembers for work at the request of employers. The hiring hall is "nonexclusive" in that workers are free to seek employment through other means, and employers are not restricted to hiring persons recommended by the union. Petitioner, a member of the union, filed suit alleging that respondent: (1) violated §§ 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)—which forbid a union to "fin[e], suspen[d], expe[l], or otherwise disciplin[e]" a member for exercising LMRDA-secured rights—by refusing to refer him through the hiring hall as a result of his political opposition to respondent's leadership; and (2) breached its duty of fair representation under the National Labor Relations Act (NLRA) by discriminating against him in respect to such referrals. The District Court dismissed the suit on the ground that discrimination in hiring hall referrals constitutes an unfair labor practice subject to the exclusive jurisdiction of the National Labor Relations Board (NLRB or Board). The Court of Appeals affirmed, ruling that fair representation claims must be brought before the Board and that petitioner had failed to state a claim under the LMRDA.

Held:

1. The District Court did not lack jurisdiction over petitioner's fair representation suit. Pp. 73–90.

(a) The NLRB does not have exclusive jurisdiction over a union member's claim that his union breached its duty of fair representation by discriminating against him in job referrals made by the union hiring hall. The fact that the alleged violation of respondent's duty of fair representation might also be an unfair labor practice, over which state and federal courts lack jurisdiction under *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245, did not deprive the District Court of jurisdiction over petitioner's fair representation claim, since *Vaca* v. *Sipes*, 386 U. S. 171, held that *Garmon*'s pre-emption rule does not extend to suits alleging such claims. No exception to the *Vaca* rule can be created for fair representation complaints arising out of the operation of hir-

ing halls on the ground that the NLRB has developed substantial expertise in dealing with hiring hall policies. Such a rule would remove an unacceptably large number of fair representation claims from federal courts, since the NLRB has developed an unfair labor practice jurisprudence in many areas traditionally encompassed by the duty of fair representation. Decisions of this Court containing language recognizing the need for a single expert federal agency to adjudicate difficult hiring hall problems are distinguished, since those cases focused on whether exclusive hiring halls had encouraged union membership impermissibly as forbidden by the NLRA, rather than on whether unions have administered properly out-of-work lists as required by their duty of fair representation. Also distinguished are the Court's decisions holding that state-court hiring hall suits are pre-empted by NLRB jurisdiction, since state-law claims frequently involve tort, contract, and other substantive areas of law that have developed independently of federal labor law, whereas the duty of fair representation has "judicially evolved" as part of federal labor law and is unlikely generally to create conflicts with the operative realities of federal labor policy. The Court of Appeals' holding that an employee cannot prevail in a fair representation suit against his *union* if he fails to allege that his *employer* breached the collective-bargaining agreement constitutes a misstatement of existing law. Although *Vaca* recognized the desirability of having the same entity adjudicate a joint fair representation/breach-of-contract action, it in no way implied that a fair representation action *requires* a concomitant claim against the employer. Independent federal-court jurisdiction exists over fair representation claims because the duty of fair representation is implied from the NLRA's grant of exclusive representation status to unions, such that the claims "aris[e] under a[n] Act of Congress regulating commerce" within the meaning of 28 U. S. C. § 1337(a), the pertinent jurisdictional provision. Moreover, a fair representation claim is a separate cause of action from any possible suit against the employer. Thus, this Court declines to adopt a rule that exclusive jurisdiction lies in the NLRB over any fair representation suit whose hypothetical accompanying claim against the employer might be raised before the Board. Pp. 73–84.

(b) Petitioner has not failed to allege a fair representation claim. There is no merit to respondent's contention that it did not breach its duty of fair representation because that duty should be defined in terms of what is an unfair labor practice, and because it committed no such practice since the NLRA forbids only union discrimination based on union membership or lack thereof and not on any other form of maladministration of a job referral system. Equating breaches of the duty of fair representation with unfair labor practices would make the two redundant, despite their different purposes, and would eliminate some

of the prime virtues of the fair representation duty—flexibility and adaptability. That duty is not intended to mirror the contours of unfair labor practices, but arises independently in order to prevent arbitrary conduct against individuals deprived by the NLRA of traditional forms of redress against unions. Also without merit is respondent's contention that it should be relieved of its duty of fair representation because, in the hiring hall context, it is acting essentially as an employer in matching up job requests with available personnel and therefore does not "represent" the employees as a bargaining agent. That the particular function of job referral resembles a task that an employer might perform is of no consequence, since the union is administering a provision of the collective-bargaining agreement and is therefore subject to the duty of fair representation. *Humphrey* v. *Moore*, 375 U. S. 335, 342. In fact, if a union assumes the employer's role in a hiring hall, its responsibility to exercise its power fairly *increases* rather than *decreases*, since the individual employee then stands alone against a single entity, the joint union/employer. Pp. 84–90.

2. Respondent's alleged refusal to refer petitioner to employment through the union hiring hall as a result of his political opposition to the union's leadership does not give rise to a claim under §§ 101(a)(5) and 609 of the LMRDA. By using the phrase "otherwise discipline," those sections demonstrate a congressional intent to denote only punishment authorized by the union as a collective entity to enforce its rules and not to include all acts that deterred the exercise of LMRDA-protected rights. The construction that the term refers only to actions undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership is buttressed by the legislative history and by the statute's structure, which specifically enumerates types of discipline—fine, expulsion, and suspension—that imply some sort of established disciplinary process rather than ad hoc retaliation by individual union officers, and which, in § 101(a)(5), includes procedural safeguards designed to protect against improper disciplinary action—"written specific charges," "a reasonable time to prepare a defense," and a "full and fair hearing"—that would apply to the type of procedure encountered in *Boilermakers* v. *Hardeman*, 401 U. S. 233, 236–237, whereby a union imposes "discipline" by virtue of its own authority over its members, and not to instances of unofficial, *sub rosa* discrimination. Here, the opprobrium of the union *as an entity* was not visited on petitioner, since he has alleged only that he was the victim of personal vendettas of union officers and not that he was punished by any tribunal or subjected to any proceedings convened by respondent. Pp. 90–94.

849 F. 2d 997, affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post*, p. 95.

Francis J. Landry argued the cause and filed briefs for petitioner.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Acting Solicitor General Bryson, Stephen L. Nightingale, Joseph E. DeSio, Robert E. Allen, Norton J. Come, Linda Sher, Jerry G. Thorn, Allen H. Feldman, Steven J. Mandel*, and *Anne P. Fugett.*

Laurence Gold argued the cause for respondent. With him on the brief were *Jeffrey I. Julius* and *Marsha Berzon.**

JUSTICE BRENNAN delivered the opinion of the Court.

This case presents two questions under the federal labor laws: first, whether the National Labor Relations Board (NLRB or Board) has exclusive jurisdiction over a union member's claims that his union both breached its duty of fair representation and violated the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519, 29 U. S. C. §401 *et seq.* (1982 ed.), by discriminating against him in job referrals made by the union hiring hall; and second, whether the union's alleged refusal to refer him to employment through the hiring hall as a result of his political opposition to the union's leadership gives rise to a claim under §§101(a)(5) and 609 of the LMRDA, 29 U. S. C. §§411(a)(5), 529 (1982 ed.). The Court of Appeals for the Sixth Circuit held that petitioner's suit fell within the exclusive jurisdiction of the Board and that petitioner had failed to state a claim

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*Briefs of *amici curiae* urging reversal were filed for the Association for Union Democracy et al. by *Paul Alan Levy, Alan B. Morrison*, and *Arthur L. Fox II*; and for the National Right to Work Legal Defense Foundation by *Rossie D. Alston, Jr.*, and *Glenn M. Taubman.*

under the LMRDA. 849 F. 2d 997 (1988) *(per curiam)*. We reverse the Court of Appeals' decision as to jurisdiction, but we affirm its holding that petitioner did not state a claim under LMRDA §§ 101(a)(5) and 609.

I

Petitioner Lynn L. Breininger was at all relevant times a member of respondent, Local Union No. 6 of the Sheet Metal Workers International Association. Pursuant to a multi-employer collective-bargaining agreement, respondent operates a hiring hall through which it refers both members and nonmembers of the union for construction work. Respondent maintains an out-of-work list of individuals who wish to be referred to jobs. When an employer contacts respondent for workers, he may request certain persons by name. If he does not, the union begins at the top of the list and attempts to telephone in order each worker listed until it has satisfied the employer's request. The hiring hall is not the exclusive source of employment for sheet metal workers; they are free to seek employment through other mechanisms, and employers are not restricted to hiring only those persons recommended by the union.[1] Respondent also maintains a job referral list under the Specialty Agreement, a separate collective-bargaining agreement negotiated to cover work on siding, decking, and metal buildings.

Petitioner alleges that respondent refused to honor specific employer requests for his services and passed him over in making job referrals. He also contends that respondent refused to process his internal union grievances regarding

[1] The word "exclusive" when used with respect to job referral systems is a term of art denoting the degree to which hiring is reserved to the union hiring hall. Hiring is deemed to be "exclusive," for example, if the union retains sole authority to supply workers to the employer up to a designated percentage of the work force or for some specified period of time, such as 24 or 48 hours, before the employer can hire on his own. See *Carpenters, Local 608 (Various Employers)*, 279 N. L. R. B. 747, 754 (1986), enf'd, 811 F. 2d 149 (CA2), cert. denied, 484 U. S. 817 (1987).

these matters. Petitioner's first amended complaint contained two counts. First, he asserted a violation of the duty of fair representation, contending that respondent, "in its representation of [petitioner], has acted arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause." First Amended Complaint ¶ 13. Second, petitioner alleged that his union, "in making job referrals, . . . has favored a faction of members . . . who have been known to support . . . the present business manager," as "part of widespread, improper discipline for political opposition in violation of 29 U. S. C. [§ 411(a)(5)] and 29 U. S. C. § 529." *Id.*, ¶ 17. Respondent, in other words, "acting by and through its present business manager . . . and its present business agent [has] 'otherwise disciplined'" petitioner within the meaning of LMRDA §§ 101(a)(5) and 609. *Id.*, ¶ 16.

The District Court held that it lacked jurisdiction to entertain petitioner's suit because "discrimination in hiring hall referrals constitutes an unfair labor practice," and "[t]he NLRB has exclusive jurisdiction over discrimination in hiring hall referrals." No. C 83–1126 (ND Ohio, Feb. 20, 1987), p. 6, reprinted in App. to Pet. for Cert. A9. The District Court determined that adjudicating petitioner's claims "would involve interfe[r]ing with the NLRB's exclusive jurisdiction." *Id.*, at 7, App. to Pet. for Cert. A10.

The Court of Appeals affirmed in a brief *per curiam* opinion. With respect to the fair representation claim, the court noted that "[c]ircuit courts have consistently held that . . . fair representation claims must be brought before the Board" and that "if the employee fails to affirmatively allege that his *employer* breached the collective bargaining agreement, which [petitioner] failed to do in the case at bar, he cannot prevail." 849 F. 2d, at 999 (emphasis in original). In regard to the LMRDA count, the Court of Appeals found that "[d]iscrimination in the referral system, because it does not breach the employee's union membership rights, does not constitute 'discipline' within the meaning of LMRDA" and

that "[h]iring hall referrals are not a function of union membership since referrals are available to nonmembers as well as members." *Ibid.* We granted certiorari. 489 U. S. 1009 (1989).

II

A

We have long recognized that a labor organization has a statutory duty of fair representation under the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (1982 ed.), "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967); see also *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203 (1944). In *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enf. denied, 326 F. 2d 172 (CA2 1963), the NLRB determined that violations of the duty of fair representation might also be unfair labor practices under § 8(b) of the NLRA, as amended, 29 U. S. C. § 158(b) (1982 ed.).[2] The Board held that the right of employees under § 7 of the NLRA, as amended, 29 U. S. C. § 157, to form, join, or assist labor organizations, or to refrain from such activities, "is a statutory limitation on statutory bargaining representatives, and . . . that Section 8(b)(1)(A) of the Act

[2] Section 8(b)(1)(A) provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce "employees in the exercise of the rights guaranteed in section 157 of this title [§ 7 of the NLRA]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U. S. C. § 158(b)(1)(A) (1982 ed.). Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." § 158(b)(2).

accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 N. L. R. B., at 185. In addition, the Board reasoned that "a statutory bargaining representative and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Id.*, at 186. While petitioner alleged a breach of the duty of fair representation, his claim might relate to conduct that under *Miranda Fuel* also constitutes an unfair labor practice. And, as a general matter, neither state nor federal courts possess jurisdiction over claims based on activity that is "arguably" subject to §§ 7 or 8 of the NLRA. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959).

Nevertheless, the District Court was not deprived of jurisdiction. In *Vaca* v. *Sipes*, *supra*, we held that *Garmon*'s pre-emption rule does not extend to suits alleging a breach of the duty of fair representation. Our decision in *Vaca* was premised on several factors. First, we noted that courts developed and elaborated the duty of fair representation before the Board even acquired statutory jurisdiction over union activities. Indeed, fair representation claims often involve matters "not normally within the Board's unfair labor practice jurisdiction," 386 U. S., at 181, which is typically aimed at "effectuating the policies of the federal labor laws, not [redressing] the wrong done the individual employee," *id.*, at 182, n. 8. We therefore doubted whether "the Board brings substantially greater expertise to bear on these problems than do the courts." *Id.*, at 181. Another consideration in *Vaca* for finding the fair representation claim judicially cognizable was the NLRB General Counsel's unreviewable discretion to refuse to institute unfair labor practice proceedings. "[T]he General Counsel will refuse to bring complaints on be-

half of injured employees when the injury complained of is 'insubstantial.'" *Id.*, at 183, n. 8. The right of the individual employee to be made whole is "[o]f paramount importance," *Bowen* v. *United States Postal Service*, 459 U. S. 212, 222 (1983), and "[t]he existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine," *Vaca*, *supra*, at 182–183. Consequently, we were unwilling to assume that Congress intended to deny employees their traditional fair representation remedies when it enacted § 8(b) as part of the Labor Management Relations Act, 1947 (LMRA). As JUSTICE WHITE described *Vaca* v. *Sipes* last Term in *Karahalios* v. *Federal Employees*, 489 U. S. 527, 535 (1989):

> "As we understood our inquiry, it was whether Congress, in enacting § 8(b) in 1947, had intended to oust the courts of their role enforcing the duty of fair representation implied under the NLRA. We held that the 'tardy assumption' of jurisdiction by the NLRB was insufficient reason to abandon our prior cases, such as *Syres* [v. *Oil Workers*, 350 U. S. 892 (1955)]."

That a breach of the duty of fair representation might also be an unfair labor practice is thus not enough to deprive a federal court of jurisdiction over the fair representation claim. See *Communications Workers* v. *Beck*, 487 U. S. 735, 743 (1988).

We decline to create an exception to the *Vaca* rule for fair representation complaints arising out of the operation of union hiring halls. Although the Board has had numerous opportunities to apply the NLRA to hiring hall policies,[3] we

[3] The Board has determined that a labor organization that is the statutory collective-bargaining representative of employees utilizing its exclusive hiring hall is barred from using unfair, irrelevant, or invidious considerations in making referrals of such employees. See *Journeymen Pipe Fitters, Local No. 392*, 252 N. L. R. B. 417, 421 (1980), enf. denied, 712 F.

reject the notion that the NLRB ought to possess exclusive jurisdiction over fair representation complaints in the hiring hall context because it has had experience with hiring halls in the past.[4] As an initial matter, we have never suggested that the *Vaca* rule contains exceptions based on the subject matter of the fair representation claim presented, the relative expertise of the NLRB in the particular area of labor law involved, or any other factor. We are unwilling to begin the process of carving out exceptions now, especially since we

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2d 225 (CA6 1983) *(per curiam)*. The Board has held that "any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function." *Operating Engineers, Local 406*, 262 N. L. R. B. 50, 51 (1982), enf'd, 701 F. 2d 504 (CA5 1983) *(per curiam)*; see also *Teamsters, Local No. 174 (Totem Beverages, Inc.)*, 226 N. L. R. B. 690, 698–700 (1976); *Boilermakers, Local Lodge 169 (Riley Stoker Corp.)*, 209 N. L. R. B. 140, 144–145 (1974). Deviation from clear and unambiguous standards in refusing to refer an employee for work establishes a prima facie violation of §§ 8(b)(1)(A) and 8(b)(2), irrespective of whether the deviation is related to discrimination based on union membership. See *NLRB* v. *International Association of Bridge, Structural and Ornamental Iron Workers*, 600 F. 2d 770, 776–777 (CA9 1979), cert. denied, 445 U. S. 915 (1980); *International Association of Heat and Frost Insulation, Local 22 (Rosendahl, Inc.)*, 212 N. L. R. B. 913 (1974). The Board in some cases has found unfair labor practices based on discriminatory referrals by nonexclusive hiring halls. See *Iron Workers, Local 577 (Tri-State Steel Erectors)*, 199 N. L. R. B. 37 (1972); *Hoisting and Portable Engineers, Local No. 4 (Carlson Corp.)*, 189 N. L. R. B. 366 (1971), enf'd, 456 F. 2d 242 (CA1 1972); *Chauffeurs' Union, Local 923, Teamsters (Yellow Cab Co.)*, 172 N. L. R. B. 2137, 2138 (1968); cf. *Teamsters, Local 17*, 251 N. L. R. B. 1248, 1256–1259 (1980). We intimate no views on the merits of any of the Board's decisions.

[4] That the Board has joined an *amicus* brief supporting petitioner shows that it does not share respondent's concern that its jurisdiction is being invaded in this case. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 298, n. 8 (1971).

see no limiting principle to such an approach. Most fair representation cases require great sensitivity to the tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals.[5] Furthermore, we have never indicated that NLRB "experience" or "expertise" deprives a court of jurisdiction over a fair representation claim. The Board has developed an unfair labor practice jurisprudence in many areas traditionally encompassed by the duty of fair representation. The Board, for example, repeatedly has applied the *Miranda Fuel* doctrine in cases involving racial discrimination. See *International Brotherhood of Painters, Local 1066 (W. J. Siebenoller, Jr., Paint Co.)*, 205 N. L. R. B. 651, 652 (1973); *Houston Maritime Assn., Inc. (Longshoremen Local 1351)*, 168 N. L. R. B. 615, 616–617 (1967), enf. denied, 426 F. 2d 584 (CA5 1970); *Cargo Handlers, Inc. (Longshoremen Local 1191)*, 159 N. L. R. B. 321, 322–327 (1966); *United Rubber Workers, Local No. 12 (Business League of Gadsden)*, 150 N. L. R. B. 312, 314–315 (1964), enf'd, 368 F. 2d 12 (CA5 1966), cert. denied, 389 U. S. 837 (1967); *Automobile Workers, Local 453 (Maremont Corp.)*, 149 N. L. R. B. 482, 483–484 (1964); *Longshoremen, Local 1367 (Galveston Maritime Assn., Inc.)*, 148 N. L. R. B. 897, 897–900 (1964), enf'd, 368 F. 2d 1010 (CA5 1966), cert. denied, 389 U. S. 837 (1967); *Independent Metal Workers, Local No. 1 (Hughes Tool Co.)*, 147 N. L. R. B. 1573, 1574 (1964); see also *Handy Andy, Inc.*, 228 N. L. R. B. 447, 455–456 (1977). In addition, the Board has found gender discrimination by unions to be an unfair labor practice. See *Wolf Trap Foundation for the Performing Arts*, 287 N. L. R. B. 1040 (1988), 127 LRRM 1129, 1130 (1988); *Olympic S. S. Co.*, 233 N. L. R. B. 1178, 1189 (1977); *Glass Bottle Blowers Assn.*,

[5] "Complexity," for example, has never prevented us from holding that unions must arbitrate grievances fairly, see *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Conley* v. *Gibson*, 355 U. S. 41 (1957), despite the difficult tradeoffs in grievance processing between individual rights and collective welfare.

Local 106 (Owens-Illinois, Inc.), 210 N. L. R. B. 943, 943–944 (1974), enf'd, 520 F. 2d 693 (CA6 1975); *Pacific Maritime Assn. (Longshoremen and Warehousemen, Local 52)*, 209 N. L. R. B. 519, 519–520 (1974) (Member Jenkins, concurring). In short, "[a] cursory review of Board volumes following *Miranda Fuel* discloses numerous cases in which the Board has found the duty of fair representation breached where the union's conduct was motivated by an employee's lack of union membership, strifes resulting from intraunion politics, and racial or gender considerations." *United States Postal Service*, 272 N. L. R. B. 93, 104 (1984). Adopting a rule that NLRB expertise bars federal jurisdiction would remove an unacceptably large number of fair representation claims from federal courts.

Respondent calls to our attention language in some of our decisions recognizing that "[t]he problems inherent in the operation of union hiring halls are difficult and complex, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency." *Journeymen and Apprentices* v. *Borden*, 373 U. S. 690, 695 (1963) (citation omitted). For this reason, respondent contends that "[w]hether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the Board." *Farmer* v. *Carpenters*, 430 U. S. 290, 303, n. 12 (1977). The cases cited by respondent, however, focus not on whether unions have administered properly out-of-work lists as required by their duty of fair representation, but rather on whether exclusive hiring halls have encouraged union membership impermissibly as forbidden by § 8(b). Such exclusive arrangements are not illegal *per se* under federal labor law, but rather are illegal only if they in fact result in discrimination prohibited by the NLRA. See *Teamsters* v. *NLRB*, 365 U. S. 667, 673–677 (1961); see also *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U. S. 645, 664–665 (1982). We have found *state law* pre-empted on the ground that "Board ap-

proval of various hiring hall practices would be meaningless if state courts could declare those procedures violative of the contractual rights implicit between a member and his union." *Farmer*, *supra*, at 300, n. 9. These state-law claims frequently involve tort, contract, and other substantive areas of law that have developed quite independently of federal labor law. Cf. *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399, 403–406 (1988); *Electrical Workers* v. *Hechler*, 481 U. S. 851, 855–859 (1987); *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 211 (1985); *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 103–104 (1962).

The duty of fair representation is different. It has "judicially evolved," *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 301 (1971), as part of federal labor law—predating the prohibition against unfair labor practices by unions in the 1947 LMRA. It is an essential means of enforcing fully the important principle that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." *Ibid.*; see also *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 63 (1981) ("[T]he unfair representation claim made by an employee against his union . . . is more a creature of 'labor law' as it has developed . . . than it is of general contract law"). The duty of fair representation, unlike state tort and contract law, is part of federal labor policy. Our "refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy." *Lockridge*, *supra*, at 301; see also *Vaca*, 386 U. S., at 180–181 ("A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged

breaches of the union's duty of fair representation"). We therefore decline to interpret the state-law pre-emption cases as establishing a principle that hiring halls are somehow so different from other union activities that fair representation claims are not cognizable outside of the NLRB.

The Court of Appeals below also held that if an employee fails to allege that his *employer* breached the collective-bargaining agreement, then he cannot prevail in a fair representation suit against his *union*. See 849 F. 2d, at 999. This is a misstatement of existing law. In *Vaca*, we identified an "intensely practical consideratio[n]," 386 U. S., at 183, of having the same entity adjudicate a joint claim against both the employer and the union when a wrongfully discharged employee who has not obtained relief through any exclusive grievance and arbitration procedures provided in the collective-bargaining agreement brings a breach-of-contract action against the employer pursuant to § 301(a) of the LMRA, 61 Stat. 156, 29 U. S. C. § 185(a) (1982 ed.). We noted that where the union has control of the grievance and arbitration system, the employee-plaintiff's failure to exhaust his contractual remedies may be excused if the union has wrongfully refused to process his claim and thus breached its duty of fair representation. See *Vaca*, 386 U. S., at 185–186. "[T]he wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as a bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Id.*, at 186.

Our reasoning in *Vaca* in no way implies, however, that a fair representation action *requires* a concomitant claim against an employer for breach of contract. Indeed, the earliest fair representation suits involved claims against unions for breach of the duty in *negotiating* a collective-bargaining agreement, a context in which no breach-of-contract action against an employer is possible. See *Ford Motor Co.* v.

Huffman, 345 U. S. 330 (1953); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944). Even after a collective-bargaining agreement has been signed, we have never required a fair representation plaintiff to allege that his *employer* breached the agreement in order to prevail. See, *e. g.*, *Communications Workers* v. *Beck*, 487 U. S., at 743; *Czosek* v. *O'Mara*, 397 U. S. 25, 29 (1970). "[A]n action seeking damages for injury inflicted by a breach of a union's duty of fair representation [is] judicially cognizable in any event, that is, even if the conduct complained of [is] arguably protected or prohibited by the National Labor Relations Act *and whether or not the lawsuit [is] bottomed on a collective agreement.*" *Motor Coach Employees* v. *Lockridge*, *supra*, at 299 (emphasis added).

Respondent argues that the concern in *Vaca* that suits against the employer and union be heard together in the same forum is applicable to the hiring hall situation, because any action by petitioner against an employer would be premised not on § 301 but rather on the contention that the employer had knowledge of the union conduct violating § 8(b)(1)(A) and acted on that knowledge in making an employment decision.[6] The employer would thereby violate

[6] We accept respondent's characterization of the employer's liability only for the purpose of argument. We note that the Board traditionally had imposed strict liability on an employer party to an exclusive hiring hall, solely on the basis of its being a party to the arrangement and even in the absence of proof that it had knowledge of the union's discriminatory practices. See *Frank Mascali Construction G. C. P. Co.*, 251 N. L. R. B. 219, 222 (1980), enf'd, 697 F. 2d 294 (CA2), cert. denied, 459 U. S. 988 (1982); *Longshoremen, Local 1351 (Galveston Marine Assn., Inc.)*, 122 N. L. R. B. 692, 696 (1958); *Operating Engineers Local 12 (Associated General Contractors)*, 113 N. L. R. B. 655, 661, n. 5 (1955), modified on other grounds, 237 F. 2d 670 (CA9 1956), cert. denied, 353 U. S. 910 (1957). The Board has recently abandoned the strict liability principle, holding instead that "no liability should be imposed when an employer does not have actual notice, or may not reasonably be charged with notice of a union's discriminatory operation of a referral system." *Wolf Trap Foundation for the Performing Arts*, 287 N. L. R. B. 1040, 1041 (1988), 127

NLRA § 8(a)(3), 29 U. S. C. § 158(a)(3), see *Wallace Corp.* v. *NLRB*, 323 U. S. 248, 255–256 (1944), and be held jointly and severally liable with the union, *but only in a suit before the Board.*[7] In the hiring hall environment, permitting courts to hear fair representation claims against the union would create the danger of bifurcated proceedings before a court and the NLRB. The absence of a § 301 claim, according to respondent, requires that we hold that the NLRB possesses exclusive jurisdiction over petitioner's fair representation suit.

This argument misinterprets our reasoning in *Vaca*. Because a plaintiff must as a matter of logic prevail on his unfair representation allegation against the union in order to excuse his failure to exhaust contractual remedies before he can litigate the merits of his § 301 claim against his employer, we found it "obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions." 386 U. S., at 187. Moreover, because the union's breach may have enhanced or contributed to the employee's injury, permitting fair representation suits to be heard in court facilitates the fashioning of a remedy. *Ibid.* We concluded that it made little sense to prevent courts from adjudicating fair representation claims.

The situation in the instant case is entirely different. In the hiring hall context, the Board may bring a claim alleging a violation of § 8(b)(1)(A) against the union, and a parallel suit against the employer under § 8(a)(3), without implicating the duty of fair representation at all. Or, as in the instant case, an employee may bring a claim solely against the union based on its wrongful refusal to refer him for work. While in *Vaca*

LRRM 1129, 1130 (1988). We express no view regarding the standard for liability of any of the employers in the instant case.

[7] We need not determine whether plaintiffs in petitioner's position *could* make out a § 301 claim. We simply note that petitioner in his first amended complaint did not allege a breach of contract by any employer.

an allegation that the union had breached its duty of fair representation was a necessary component of the § 301 claim against the employer, the converse is not true here: a suit against the union need not be accompanied by an allegation that an employer breached the contract, since whatever the employer's liability, the employee would still retain a legal claim against the union. The fact that an employee *may* bring his fair representation claim in federal court in order to join it with a § 301 claim does not mean that he *must* bring the fair representation claim before the Board in order to "join" it with a hypothetical unfair labor practice case against the employer that was never actually filed.

Federal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against employers. We have always assumed that independent federal jurisdiction exists over fair representation claims because the duty is implied from the grant of exclusive representation status, and the claims therefore "arise under" the NLRA. See, *e. g.*, *Tunstall* v. *Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (1944). Lower courts that have addressed the issue have uniformly found that 28 U. S. C. § 1337(a), which provides federal jurisdiction for, *inter alia*, "any civil action or proceeding arising under any Act of Congress regulating commerce," creates federal jurisdiction over fair representation claims, because we held in *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501, 504 (1954), that the NLRA is an "Act of Congress regulating commerce." See *Chavez* v. *United Food & Commercial Workers Int'l Union*, 779 F. 2d 1353, 1355, 1356 (CA8 1985); *Anderson* v. *United Paperworkers Int'l Union*, 641 F. 2d 574, 576 (CA8 1981); *Buchholtz* v. *Swift & Co.*, 609 F. 2d 317, 332 (CA8 1979), cert. denied, 444 U. S. 1018 (1980); *Mumford* v. *Glover*, 503 F. 2d 878, 882–883 (CA5 1974); *Retana* v. *Apartment, Motel, Hotel & Elevator Operators Local 14*, 453 F. 2d 1018, 1021–1022 (CA9 1972); *De Arroyo* v. *Sindicato de Trabajadores Packinghouse*, 425 F. 2d 281, 283, n. 1 (CA1), cert. denied, 400

U. S. 877 (1970); *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103, 106 (CA3 1968); see also *Bautista* v. *Pan American World Airlines, Inc.*, 828 F. 2d 546, 549 (CA9 1987). We agree with this reasoning. Because federal-court jurisdiction exists over a fair representation claim regardless of whether it is accompanied by a breach-of-contract claim against an employer under § 301,[8] and because a fair representation claim is a separate cause of action from any possible suit against the employer, we decline to adopt a rule that exclusive jurisdiction lies in the NLRB over any fair representation suit whose hypothetical accompanying claim against the employer might be raised before the Board.

The concerns that animated our decision in *Vaca* are equally present in the instant case. The Court of Appeals erred in holding that the District Court was without jurisdiction to hear petitioner's fair representation claim.

B

Respondent contends that even if jurisdiction in federal court is proper, petitioner has failed to allege a fair representation claim for two reasons.

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[8] The development of the law in the § 301 context is not to the contrary. We have recognized that although a § 301 suit against the employer and a fair representation claim against the union are "inextricably interdependent," *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 66–67 (1981) (Stewart, J., concurring in judgment), breach of the duty of fair representation is a cause of action separate from the claim against the employer. See *DelCostello* v. *Teamsters*, 462 U. S. 151, 164, 165 (1983) (noting that a hybrid fair representation/§ 301 suit "comprises two causes of action" and that "[t]he employee may, if he chooses, sue one defendant and not the other"); *United Parcel Service*, 451 U. S., at 66 (Stewart, J., concurring in judgment) (§ 301 and fair representation claim each has "its own discrete jurisdictional base"); *id.*, at 73, n. 2 (STEVENS, J., concurring in part and dissenting in part) ("[D]espite this close relationship, the two claims are not inseparable. Indeed, although the employee in this case chose to sue both the employer and the union, he was not required to do so; he was free to institute suit against either one as the sole defendant").

1

First, respondent notes that we have interpreted NLRA § 8(a)(3) to forbid employer discrimination in hiring only when it is intended to discriminate on a union-related basis. See, *e. g.*, *NLRB* v. *Brown*, 380 U. S. 278, 286 (1965). Respondent maintains that symmetry requires us to interpret § 8(b)(2) as forbidding only discrimination based on union-related criteria and not any other form of maladministration of a union job referral system.[9] Respondent contends that under this standard it committed no unfair labor practice in this case. The LMRA, according to respondent, reflects a purposeful

[9] Respondent contends that § 8(b)(1)(A) should be construed *in pari materia* with § 8(b)(2) as requiring a showing of union-related discrimination. See *Teamsters* v. *NLRB*, 365 U. S. 667, 676 (1961) (§ 8(b)(1) condemns a hiring hall "which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment"); *Local 277, Int'l Brotherhood of Painters* v. *NLRB*, 717 F. 2d 805, 808–809 (CA3 1983); *NLRB* v. *Local Union 633, United Assn. of Journeymen and Plumbers*, 668 F. 2d 921, 922–923 (CA6 1982) *(per curiam); NLRB* v. *Local 143, Moving Picture and Projection Machine Operators Union*, 649 F. 2d 610, 612 (CA8 1981). The NLRB, however, has construed §§ 8(b)(1)(A) and 8(b)(2) more expansively to bar the use of unfair, irrelevant, or invidious considerations in employee referrals of employees, and to prohibit, absent sufficient justification by the union, any departure from established procedures. See n. 3, *supra*. We need not pass on the wisdom of the Board's interpretation, because we hold that whatever the proper reading of § 8(b), petitioner has stated a claim for breach of the duty of fair representation. We note, however, that respondent's arguments are inconsistent. On the one hand, respondent contends that courts should not entertain fair representation suits because to do so would disturb NLRB efforts to create a uniform unfair labor practice body of law governing hiring halls. On the other hand, respondent maintains that the NLRB rules with respect to hiring hall unfair labor practices are actually in excess of what the statute authorizes. If that is so, the NLRB does not seem particularly "expert" in this area. Moreover, if the NLRB's hiring hall rules are void because they are beyond what the statute permits, then there is no overlap between the duty of fair representation and the unfair labor practices developed by the Board, and there is in fact *less* reason to hold that courts lack jurisdiction over hiring hall fair representation claims.

congressional decision to limit the scope of § 8(b)(2) to instances where a union discriminates solely on the basis of union membership or lack thereof. This decision would be negated if the duty of fair representation were construed as extending further than the unfair labor practice provisions of the NLRA.

We need not decide the appropriate scope of §§ 8(b)(1)(A) and 8(b)(2) because we reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice. Respondent's argument rests on a false syllogism: (a) because *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enf. denied, 326 F. 2d 172 (CA2 1963), establishes that a breach of the duty of fair representation is also an unfair labor practice, and (b) the conduct in this case was not an unfair labor practice, therefore (c) it must not have been a breach of the duty of fair representation either. The flaw in the syllogism is that there is no reason to equate breaches of the duty of fair representation with unfair labor practices, especially in an effort to *narrow* the former category. The NLRB's rationale in *Miranda Fuel* was precisely the opposite; the Board determined that breaches of the duty of fair representation were also unfair labor practices in an effort to *broaden*, not *restrict*, the remedies available to union members. See 140 N. L. R. B. at 184–186.[10] Pegging the duty of fair representation to the Board's definition of unfair labor practices would make the two redundant, despite their different purposes, and would eliminate some of the prime virtues of the duty of fair representation—flexibility and adaptability. See *Vaca*, 386 U. S., at 182–183.

The duty of fair representation is not intended to mirror the contours of § 8(b); rather, it arises independently from

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[10] Similarly, in deciding not to enforce *Miranda Fuel*, the Second Circuit explicitly rejected a crabbed view of the duty of fair representation and juxtaposed a statement of the narrowness of § 8 with an acknowledgment that the duty of fair representation is a broader concept. See 326 F. 2d, at 176. No decision of this Court has held otherwise.

the grant under § 9(a) of the NLRA, 29 U. S. C. § 159(a) (1982 ed.), of the union's exclusive power to represent all employees in a particular bargaining unit. It serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca, supra,* at 182; see also *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181 (1967) ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation"). Respondent's argument assumes that enactment of the LMRA in 1947 somehow limited a union's duty of fair representation according to the unfair labor practices specified in § 8(b). We have never adopted such a view, and we decline to do so today.

2

Second, respondent insists that petitioner has failed to state a claim because in the hiring hall setting a union is acting essentially as an employer in matching up job requests with available personnel. Because a union does not "represent" the employees as a bargaining agent in such a situation, respondent argues that it should be relieved entirely of its duty of fair representation.[11]

We cannot accept this proposed analogy. Only because of its status as a Board-certified bargaining representative

[11] Respondent's argument would require us to find that there is no duty of fair representation at all in the hiring hall context; this is a position which cannot be reconciled with numerous decisions of the Courts of Appeals and the NLRB. See, *e. g.*, *Lewis* v. *Local 100, Laborers' Int'l Union*, 750 F. 2d 1368, 1376 (CA7 1984); *Beriault* v. *Local 40, Super Cargoes & Checkers of Int'l Longshoremen's Union*, 501 F. 2d 258, 264–266 (CA9 1974); *Smith* v. *Local No. 25, Sheet Metal Workers Int'l Assn.*, 500 F. 2d 741, 748–749 (CA5 1974); *Operating Engineers, Local 406*, 262 N. L. R. B., at 51, 57; *Carpenters, Local 608 (Various Employers)*, 279 N. L. R. B., at 754–755; *Journeymen Pipe Fitters, Local No. 392*, 252 N. L. R. B., at 421–422; *Bricklayers' and Stonemasons' Int'l Union, Local No. 8*, 235 N. L. R. B. 1001, 1006–1008 (1978).

and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because the members of the bargaining unit have entrusted the union with the task of representing them. That the particular function of job referral resembles a task that an employer might perform is of no consequence. The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation. "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation *and administration* of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964) (emphasis added). See *Communications Workers* v. *Beck*, 487 U. S., at 739; *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 564 (1976); see also *Electrical Workers* v. *Hechler*, 481 U. S., at 861–862; *id.*, at 865 (STEVENS, J., concurring in part and dissenting in part).

In *Vaca* v. *Sipes*, *supra*, for example, we held that a union has a duty of fair representation in grievance arbitration, despite the fact that NLRA § 9(a) expressly reserves the right of "any individual employee or group of employees . . . to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." The union in *Vaca* exercised power over grievances because the contract so provided, not because the NLRA required such an arrangement. Hence, the observation that a contract might provide for the operation of a hiring hall directly by a consortium of interested employers rather than a union is irrelevant; the same might have been said about the system for processing grievances in *Vaca*. In

short, a union does not shed its duty of fair representation merely because it is allocating job openings among competing applicants, something that might be seen as similar to what an employer does.

The union's assumption in the hiring hall of what respondent believes is an "employer's" role in no way renders the duty of fair representation inapplicable. When management administers job rights outside the hiring hall setting, arbitrary or discriminatory acts are apt to provoke a strong reaction through the grievance mechanism. In the union hiring hall, however, there is no balance of power. If respondent is correct that in a hiring hall the union has assumed the mantle of employer, then the individual employee stands alone against a single entity: the joint union/employer. An improperly functioning hiring hall thus resembles a closed shop, "'with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.'" *Teamsters* v. *NLRB*, 365 U. S., at 674 (quoting S. Rep. No. 1827, 81st Cong., 2d Sess., 14 (1947)); see also Note, Unilateral Union Control of Hiring Halls: The Wrong and the Remedy, 70 Yale L. J. 661, 674 (1961). In sum, if a union does wield additional power in a hiring hall by assuming the employer's role, its responsibility to exercise that power fairly *increases* rather than *decreases*. That has been the logic of our duty of fair representation cases since *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S., at 200.[12]

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[12] It was for this reason that the Board sought in its decision in *Mountain Pacific Chapter, Associated General Contractors*, 119 N. L. R. B. 883, enf. denied, 270 F. 2d 425 (CA9 1959), to require an exclusive hiring hall to incorporate certain procedural safeguards in the agreement establishing the exclusive arrangement. Although we held in *Teamsters* v. *NLRB*, 365 U. S. 667 (1961), that the Board's approach in *Mountain Pacific* exceeded the mandate of the NLRA, our decision in that case was confined to the unfair labor practice context and did not purport to determine the proper scope of the duty of fair representation. In addition, we were careful to note that the Board retained authority "to determin[e] whether

We reject respondent's contention that petitioner's complaint fails to state a fair representation claim.

III

The Court of Appeals rejected petitioner's LMRDA claim on the ground that petitioner had failed to show that he was "otherwise disciplined" within the meaning of LMRDA §§ 101(a)(5) and 609, 29 U. S. C. §§ 411(a)(5) and 529 (1982 ed.). These provisions make it unlawful for a union to "fin[e], suspen[d], expe[l], or otherwise disciplin[e]" any of its members for exercising rights secured under the LMRDA.[13] The Court of Appeals reasoned that because "[h]iring hall referrals . . . are available to nonmembers as well as to members," 849 F. 2d, at 999, and the hiring hall was not an exclusive source of employment for sheet metal workers, petitioner did not suffer discrimination on the basis of rights he held by virtue of his *membership* in the union. We affirm the Court of Appeals' conclusion, although we do not adopt its reasoning.[14]

In *Finnegan* v. *Leu*, 456 U. S. 431 (1982), we held that removal from appointive union employment is not within the scope of § 609's prohibitions, because that section was "meant to refer only to punitive actions diminishing membership rights, and not to termination of a member's status as an appointed union employee." *Id.*, at 438 (footnote omitted).

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discrimination has in fact been practiced" and to "eliminat[e] discrimination" in the operation of hiring halls. 365 U. S., at 677. *Teamsters* held invalid only the Board's attempt to impose prophylactic safeguards on hiring halls in the absence of any particularized findings of discrimination. It has no bearing on the instant case—a suit by an individual member of the union alleging specific acts in violation of the duty of fair representation.

[13] The phrase "otherwise disciplin[e]" appears in both §§ 101(a)(5) and 609, and we have already determined that it has the same meaning in both sections. See *Finnegan* v. *Leu*, 456 U. S. 431, 439, n. 9 (1982).

[14] The Court of Appeals clearly had jurisdiction over the LMRDA claim. See *Boilermakers* v. *Hardeman*, 401 U. S. 233, 238 (1971). To the extent the Court of Appeals held otherwise, it was in error.

Petitioner, joined by the United States as *amicus curiae*, argues that the Court of Appeals misapplied our reasoning in *Finnegan*, because Congress could not have intended to prohibit a union from expelling a member of the rank-and-file from a members-only hall for his political opposition to the union leadership, but to permit the leadership to impose the same sanction if the hiring hall included a few token nonmembers as well. Either way, the purpose of the Act would hardly be served if a union were able to coerce its members into obedience by threatening them with a loss of job referrals. Under the reading urged by the United States, *Finnegan* held only that the LMRDA does not protect the positions and perquisites enjoyed exclusively by union leaders; it did not narrow the protections available to "nonpolicymaking employees, that is, rank-and-file member-employees." *Finnegan*, *supra*, at 443 (BLACKMUN, J., concurring).

We need not decide the precise import of the language and reasoning of *Finnegan*, however, because we find that by using the phrase "otherwise discipline," Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules. "Discipline is the criminal law of union government." Summers, The Law of Union Discipline, 70 Yale L. J. 175, 178 (1960). The term refers only to actions "undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership." *Miller* v. *Holden*, 535 F. 2d 912, 915 (CA5 1976).

Our construction of the statute is buttressed by its structure. First, the specifically enumerated types of discipline—fine, expulsion, and suspension—imply some sort of established disciplinary process rather than ad hoc retaliation

by individual union officers.[15] See 2A C. Sands, Sutherland on Statutory Construction § 47.17, p. 166 (4th ed. 1984) *(ejusdem generis)*. Second, § 101(a)(5) includes procedural protections—"written specific charges" served before discipline is imposed, "a reasonable time" in which to prepare a defense, and a "full and fair hearing"—that would not apply to instances of unofficial, *sub rosa* discrimination. These protections contemplate imposition of discipline through the type of procedure we encountered in *Boilermakers* v. *Hardeman*, 401 U. S. 233, 236–237 (1971) (expulsion after trial before union committee, with subsequent internal union review). The fact that § 101(a)(5) does not prohibit union discipline altogether, but rather seeks to provide "safeguards against improper disciplinary action," indicates that "discipline" refers to punishment that a union can impose by virtue of its own authority over its members. A hiring hall could hardly be expected to provide a hearing before every decision *not* to refer an individual to a job.

The legislative history supports this interpretation of "discipline." Early drafts of § 101(a)(5), for example, contained elaborate lists of "due process protections," such as the presumption of innocence, venue restrictions, the right to counsel, the right to confront and cross-examine witnesses, and

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[15] We do not imply that "discipline" may be defined solely by the type of punishment involved, or that a union might be able to circumvent §§ 101 (a)(5) and 609 by developing novel forms of penalties different from fines, suspensions, or expulsions. Even respondent acknowledges that a suspension of job referrals through the hiring hall could qualify as "discipline" if it were imposed as a sentence on an individual by a union in order to punish a violation of union rules. Contrary to JUSTICE STEVENS' suggestion, *post*, at 99–100, and nn. 7, 8, we do not hold that discipline can result only from "formal" proceedings, as opposed to "informal" or "summary" ones. We note only that Congress' reference to punishments typically imposed by the union as an entity through established procedures indicates that Congress meant "discipline" to signify penalties applied by the union in its official capacity rather than ad hoc retaliation by individual union officers.

other guarantees typically found in the criminal context.[16] Congress envisioned that "discipline" would entail the imposition of punishment by a union acting in its official capacity. See 105 Cong. Rec. 5812 (1959) (remarks of Sen. McClellan) (referring to "safeguards . . . against improper disciplinary action" as procedures that must be followed before a union member can be "expelled or punished," "tried," or "suspend[ed]" by the union); *id.*, at 6023 (remarks of Sen. Kuchel) (noting that discipline may be imposed only on "the usual reasonable constitutional basis upon which [criminal] charges might be brought").

A forerunner of § 101(a)(5) in the Senate provided criminal penalties for *both* improper "discipline" by "any *labor organization*, its officers, agents, representatives, or employees" *and* the use by "*any person* . . . of force or violence, or . . . economic reprisal or threat thereof, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercising by such member of any right to which he is entitled under the provisions of this Act." S. 1555, as reported, 86th Cong., 1st Sess., 53 (1959) (emphasis added); see also S. Rep. No. 187, 86th Cong., 1st Sess., 53–54, 94 (1959); 105 Cong. Rec. 15120 (1959) (comments of Sen. Goldwater). Although S. 1555 was not passed in this form by the Senate,[17] the fact that even in an earlier bill improper *discipline by a labor organization* was listed separately from *economic coercion by any person* shows that the

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[16] See, *e. g.*, H. R. 4473, 86th Cong., 1st Sess., 12–16 (1959); H. R. 7265, 86th Cong., 1st Sess., 19–20 (1959); S. 1137, 86th Cong., 1st Sess., 11 (1959).

[17] We traced the legislative history of §§ 101(a)(5) and 609 in *Hardeman*, 401 U. S., at 242–245, and *Finnegan*, 456 U. S., at 435–441. The relevant portion of S. 1555 as passed became LMRDA § 610, 29 U. S. C. § 530 (1982 ed.), which criminalizes the threat or use of force or violence to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of rights granted under the LMRDA. Section 610 does not by its terms extend to economic reprisals.

Senate believed that the two were distinct, and that it did not intend to include the type of unauthorized "economic reprisals" suffered by petitioner in the instant case in its definition of "discipline." The bipartisan compromise bill introduced by Representatives Landrum and Griffin, which amended S. 1555 after its passage by the Senate, substituted civil remedies for the criminal penalties. Representative Griffin explained that the bill covered only the "denial of . . . rights through *union discipline*," 105 Cong. Rec. 13091 (1959) (emphasis added), an apparent reference to penalties imposed by the union in its official capacity as a labor organization. Discipline "must be done in the name of or on behalf of the union as an organizational entity." Etelson & Smith, Union Discipline Under the Landrum-Griffin Act, 82 Harv. L. Rev. 727, 732 (1969).

In the instant case, petitioner alleged only that the union business manager and business agent failed to refer him for employment because he supported one of their political rivals. He did not allege acts by the union amounting to "discipline" within the meaning of the statute. According to his complaint, he was the victim of the personal vendettas of two union officers. The opprobrium of the union *as an entity*, however, was not visited upon petitioner. He was not punished by any tribunal, nor was he the subject of any proceedings convened by respondent. In sum, petitioner has not alleged a violation of §§ 101(a)(5) and 609, and the Court of Appeals correctly dismissed his claim under the LMRDA.[18]

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[18] We do not pass on petitioner's claim that certain of his rights secured by the LMRDA were "infringed" by respondent's conduct, in violation of § 102, 29 U. S. C. § 412 (1982 ed.), because the claim was neither presented to nor decided by the Court of Appeals below, and thus is not properly before us. See *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981). In addition, the § 102 issue is not included within the relevant question on which we granted certiorari ("Whether a union's discriminatory refusal to refer its members to jobs constitutes 'discipline' within the meaning of the [LMRDA]?").

IV

We express no view regarding the merits of petitioner's claim. We hold only that the Court of Appeals erred when it determined that the District Court lacked jurisdiction over the suit, but that the Court of Appeals correctly found that petitioner failed to state a claim under §§ 101(a)(5) and 609 of the LMRDA. We remand the cause for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

When school officials inflict corporal punishment on a schoolchild, we speak of the child being "disciplined."[1] A prison inmate who is summarily deprived of "good time" credits is also subjected to "discipline."[2] So too is the soldier who as a result of misconduct is required by a superior to perform additional duties.[3] In none of these cases is the discipline imposed by a "tribunal" or as a result of a "proceeding convened by" the disciplinary official. *Ante*, at 94. Rather, what distinguishes the punishment as "discipline" is that it is imposed by one in control with a view to correcting behavior that is considered to be deviant. The Court today holds, however, that a union member who is deprived of work referrals as a result of his intraunion political activities, conduct deemed by the union to be deviant, is nonetheless not being

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[1] See, *e. g.*, *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (use of corporal punishment, without predeprivation hearing, as means of disciplining schoolchildren); *Goss* v. *Lopez*, 419 U. S. 565, 580 (1975) (suspension from school without hearing as form of discipline).

[2] See, *e. g.*, *Preiser* v. *Rodriguez*, 411 U. S. 475, 478–481 (1973) (unauthorized deprivation of prison good time credits as form of discipline).

[3] See Manual for Courts-Martial, United States, 1968, Ch. 26 (detailing forms of nonjudicial disciplinary punishment for minor offenses).

subjected to discipline. Although I join the Court's analysis and disposition of petitioner's duty of fair representation claim in Parts I and II of its opinion, I cannot join this restrictive interpretation of the LMRDA.

Title I of the LMRDA, the "Bill of Rights" of labor organizations, "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan* v. *Leu*, 456 U. S. 431, 435 (1982). These took at least two forms. First, many unions were run autocratically and did not accord their members the right of self-governance. See *Sheet Metal Workers* v. *Lynn*, 488 U. S. 347, 356, n. 8 (1989); *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 112 (1982). Accordingly, Congress decreed that union members would have equal voting rights and the freedom of speech and assembly and provided in § 102, 29 U. S. C. § 412 (1982 ed.), a means of enforcing these rights through a civil cause of action in federal court. Second, there was evidence that unions imposed discipline on their members in violation of their members' civil rights or without adequate procedural safeguards.[4] See *Finnegan*, 456 U. S., at 442 (Congress was concerned with "protecting the rights of union members from arbitrary action by the union or its officers") (emphasis deleted); *Boilermakers* v. *Hardeman*, 401 U. S. 233, 243–245 (1971). The provisions which address these concerns,

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[4] The Court is mistaken in suggesting that the predecessor to § 101 (a)(5), which distinguished between improper discipline imposed by a union and the use of economic reprisal by any person to interfere with the exercise of protected rights, signifies congressional intent that discipline not include economic reprisal. *Ante*, at 93–94. That provision, which was later embodied in § 610 of the Act, is addressed to attempts to interfere with rights protected by the substantive provisions of Title I and not to the arbitrary imposition of discipline at which the procedural provisions were aimed. It does not follow, as the Court seems to assume, that because Congress did not prohibit "all acts that deterred the exercise of rights protected under the LMRDA," *ante*, at 91, that it also intended to permit unions to employ this particularly powerful sanction without any procedural safeguards.

LRMDA §§ 101(a)(5)[5] and 609,[6] 29 U. S. C. §§ 411(a)(5), 529 (1982 ed.), are written in expansive language. They respectively prohibit the imposition of discipline by any labor "organization or any officer thereof," § 411(a)(5), and "any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof." § 529. And they refer not only to fines, suspension, and expulsion, the usual sanctions imposed by a union, but also to unspecified means by which the union "otherwise discipline[s]" its members.

As a matter of plain language, "discipline" constitutes "punishment by one in authority . . . with a view to correction or training." Webster's Third New International Dictionary 644 (1976); see also Random House Dictionary of the English Language 562 (2d ed. 1987) ("punishment inflicted by way of correction and training"); 4 Oxford English Dictionary 735 (2d ed. 1989) (same). Union discipline is thus punishment imposed by the union or its officers "to control the member's conduct in order to protect the interests of the union or its membership." *Miller* v. *Holden*, 535 F. 2d 912, 915 (CA5 1976). It easily includes the use of a hiring hall system by one who is charged with administering it to punish a member for his political opposition. Indeed, the express

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[5] Section 101(a)(5), as set forth in 29 U. S. C. § 411(a)(5) (1982 ed.), provides:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

[6] Section 609, as set forth in 29 U. S. C. § 529 (1982 ed.), provides:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section."

reference in the Act to "fines," a form of discipline that traditionally was not imposed after a trial, suggests that Congress intended the Act to reach discipline that is both informal and affects only a member's economic rights.

Moreover, as a matter of the statute's purpose and policy, it would make little sense to exclude the abuse of a hiring hall to deprive a member of job referrals from the type of discipline against which the union member is protected. Congress intended the LMRDA to prevent unions from exercising control over their membership through measures that did not provide adequate procedural protection. "[I]nterference with employment rights constitute[s] a powerful tool by which union leaders [can] control union affairs, often in violation of workers' membership rights." *Vandeventer* v. *Local Union No. 513, Int'l Union of Operating Engineers*, 579 F. 2d 1373, 1378 (CA8 1978); see also Etelson & Smith, Union Discipline Under the Landrum-Griffin Act, 82 Harv. L. Rev. 727, 732 (1969) ("Since the prime motivation to join a union is concern about one's interests as an employee, it seems manifest that a very effective method of disciplining a union member would be to cause injury to those interests"). It is inconceivable that a statute written so broadly would not include such sanctions within its compass.

The Court nonetheless concludes that the denial of hiring hall referrals is not properly attributable to the union and does not constitute discipline within the meaning of the LMRDA. The Court errs in its construction of petitioner's complaint and in its interpretation of the LMRDA. At this pleading stage, petitioner's allegations must be accepted as true and his complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spaulding*, 467 U. S. 69, 73 (1984); *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Petitioner alleges "that in failing to refer him for employment . . . the defendant, acting by and through its present business manager, David Williams,

and its present business agent, Michael Duffy, have 'otherwise disciplined' plaintiff." The union's abuse of the hiring hall system is further said to have "been part of widespread, improper discipline for political opposition." App. to Pet. for Cert. A–21. The Court elsewhere acknowledges that "the ability to refer workers for employment through a hiring hall" is a power of the *union* granted it by the collective-bargaining agreement, *ante*, at 88, and it properly concludes that petitioner's allegations are sufficient to support the imposition of liability upon the union for breaching its duty of fair representation. Petitioner's allegation that the union's officers used their union-granted authority over the hiring hall to punish him for his union activities should also be sufficient to support the claim that punishment was imposed "under color of" the union's right to control its membership and that the "opprobrium of the union *as an entity*" was "visited upon petitioner." *Ante*, at 94.

The Court states that the discriminatory use of the hiring hall to punish petitioner does not constitute discipline because it is not an "established disciplinary process" or imposed by "any tribunal" or as the result of "any proceeding." *Ante*, at 91, 94. But, as Congress was well aware,[7] discipline can be imposed informally as well as formally and pursuant to unwritten practices similar to those petitioner has alleged as well as to a formal established policy. The language and structure of the Act do not evince any intention to restrict its coverage to sanctions that are imposed by tri-

[7] Contemporaneous sources are replete with examples of discipline imposed informally and through summary procedures. See, *e. g.*, National Industrial Conference Board, Studies in Personnel Policy, No. 150, Handbook of Union Government Structure and Procedures 71–72 (1955) ("A few unions make specific statements in their constitutions that members are to be disciplined without trial for certain offenses. . . . These unions have a membership of 569,857"); Note, The Power of Trade Unions to Discipline Their Members, 96 U. Pa. L. Rev. 537, 541 (1948) ("[H]earings indicate the existence of physical violence and 'goon squad' activity as a less formal means of disciplining opposing factions").

bunals or as the result of proceedings. That Congress specified detailed procedures to be followed in disciplinary proceedings does not mean that no procedures need be followed when discipline is imposed without any proceeding whatsoever. Nor does the legislative history, which reflects Congress' intention to prevent a wide range of arbitrary union action, support such a crabbed reading.[8] By holding that the informally imposed sanctions alleged here are not covered by the LMRDA, the Court ironically deprives union members of the protection of the Act's procedural safeguards at a time when they are most needed—when the union or its officers act so secretly and so informally that the member receives no advance notice, no opportunity to be heard, and no explanation for the union's action. This construction of the labor organization's "Bill of Rights" is perverse and cannot have been intended by Congress.

Finally, this case is not controlled, as the Court of Appeals concluded, by our decision in *Finnegan* v. *Leu*, 456 U. S. 431 (1982). In that case, we held that removal from appointive union employment did not constitute discipline within the meaning of § 609. *Id.*, at 437; see also *Sheet Metal Workers* v. *Lynn*, 488 U. S., at 353, n. 5. We stated that "it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect," 456 U. S., at 437, and that "Congress [did not] inten[d] to establish a system of job security or tenure for appointed union employees," *id.*, at 438. In his brief for the United States as

[8] Indeed, even union officials testified before Congress that union disciplinary methods were informal and discipline was imposed by workers. See, *e. g.*, Hearings on H. R. 3540, H. R. 3302, H. R. 4473, and H. R. 4474 before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 4, p. 1483 (1959) (testimony of George Meany, President of American Federation of Labor and Congress of Industrial Organizations (AFL–CIO)); see also 105 Cong. Rec. App. 3294 (1959) (AFL–CIO Legislative Department Analysis of Provisions in Senator McClellan's Amendment) ("Often disciplinary proceedings are usually wholly informal").

Amicus Curiae, the Solicitor General has cogently explained why *Finnegan* is not controlling:

> "The question presented by this case is far different. Here, participation in the Union's job referral program is a benefit enjoyed by all members of the Union within the bargaining unit, and the issue is whether withdrawal of the benefit can be deemed 'discipline' even though that benefit may also be extended to non-members of the Union. *Finnegan*'s emphasis on the distinction between union members and union leaders does not apply to this situation. In fact, the court of appeals' reliance on language in *Finnegan* that drew that distinction turns the Court's approach on its head. *Finnegan*'s conclusion that the Act did not protect the positions and perquisites enjoyed only by union leaders was surely not intended to narrow the class of benefits, enjoyed by the rank-and-file, that cannot be withdrawn in retaliation for the exercise of protected rights.
>
> "The court of appeals implicitly acknowledged (see Pet. App. A3) that participation in a job referral system limited to union members would be a part of 'a union member's rights or status *as a member of the union*' (456 U. S. at 437). The fact that non-members may be included within the system should not alter that characterization. In either case, when a union member's removal from or demotion on an out-of-work list is based upon a violation of a union rule or policy, or political opposition to the union's leadership, the removal or demotion can fairly be characterized as a punitive action taken against the member *as a member* that sets him apart from other members of the rank-and-file. See *id.* at 437–438. Moreover, such an action bears enough similarity to the specific disciplinary actions referred to in Section 609 to fall within the residual category of

sanctions—encompassed by the phrase 'otherwise disciplined'—that are subject to that provision."[9]

Today the Court correctly refuses to adopt the Court of Appeals' reasoning, but its rationale is just as flawed as that of the Court of Appeals. Retaliation effected through a union job referral system is a form of discipline even if the system is used by nonmembers as well as members and even if the sanction is the result of an *ex parte*, ad hoc, unrecorded decision by the union.

I respectfully dissent from the Court's disposition of petitioner's claim under the Labor-Management Reporting and Disclosure Act of 1959.

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[9] Brief for United States as *Amicus Curiae* 19–20 (footnote omitted). Most of the Courts of Appeals that have considered the issue have properly concluded that depriving a member of job referrals and other forms of economic reprisals can constitute discipline under the LMRDA. See *Guidry* v. *International Union of Operating Engineers, Local 406*, 882 F. 2d 929, 940–941 (CA5 1989); *Murphy* v. *International Union of Operating Engineers, Local 18*, 774 F. 2d 114, 122–123 (CA6 1985), cert. denied, 475 U. S. 1017 (1986); *Keene* v. *International Union of Operating Engineers*, 569 F. 2d 1375 (CA5 1978); see also *Moore* v. *Local 569, Int'l Brotherhood of Electrical Workers*, 653 F. Supp. 767 (SD Cal. 1987); T. Kheel, Labor Law § 43.06[4], 43–105 (1986); Beaird & Player, Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?, 9 Ga. L. Rev. 383, 392 (1975); Etelson & Smith, Union Discipline Under the Landrum-Griffin Act, 82 Harv. L. Rev. 727, 733 (1969). But see Comment, Applicability of LMRDA Section 101 (a)(5) to Union Interference with Employment Opportunities, 114 U. Pa. L. Rev. 700 (1966). Two Courts of Appeals have held that suspension of a member from a nonexclusive job referral system did not constitute discipline when such suspension was required by the terms of the collective-bargaining agreement. See *Turner* v. *Local Lodge No. 455, Int'l Brotherhood of Boilermakers*, 755 F. 2d 866, 869–870 (CA11 1985); *Hackenburg* v. *International Brotherhood of Boilermakers*, 694 F. 2d 1237, 1239 (CA10 1982); see also *Figueroa* v. *National Maritime Union of America*, 342 F. 2d 400 (CA2 1965) (although interference with employment opportunities is covered by Act, union's compliance with collective-bargaining agreement in refusing to refer seaman does not constitute discipline).

Syllabus

GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88–840. Argued October 3, 1989—Decided December 5, 1989

After this Court held that respondent city had violated federal law by conditioning the renewal of petitioner's taxicab franchise on settlement of a pending labor dispute between petitioner and its union, *Golden State Transit Corp.* v. *Los Angeles*, 475 U. S. 608 *(Golden State I)*, the District Court enjoined the city to reinstate the franchise. However, the court concluded that 42 U. S. C. § 1983 did not authorize a compensatory damages award, since the Supremacy Clause does not create individual rights that may be vindicated in an action for damages under § 1983; and since, even though the city's conduct was pre-empted by the National Labor Relations Act (NLRA) under *Golden State I*, there had been no "direct violation" of the statute, and the Act's comprehensive enforcement scheme precluded resort to § 1983. The Court of Appeals affirmed.

Held: Petitioner is entitled to maintain a § 1983 action for compensatory damages. Pp. 105–113.

(a) The Supremacy Clause, of its own force, does not create rights enforceable under § 1983. The Clause "is not a source of any federal rights"; rather, it "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 613. Pp. 107–108.

(b) However, the NLRA grants petitioner rights enforceable under § 1983. A § 1983 remedy is not precluded by the existence of a comprehensive enforcement scheme, since the NLRA provides no mechanism to address state interference with federally protected labor rights. Moreover, the city's argument that its conduct did not violate any rights secured by the NLRA is rejected, since petitioner is the intended beneficiary of a statutory scheme that gives parties to a collective-bargaining agreement the right to make use of "economic weapons," not expressly set forth in the NLRA, free of federal or state governmental interference. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 150. The violation of a federal right that is implicit in a statute's language and structure is as much a "direct violation" of a right

as is the violation that is clearly set forth in the text of the statute. Pp. 108–112.

857 F. 2d 631, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and SCALIA, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 113.

Zachary D. Fasman argued the cause and filed briefs for petitioner.

John F. Haggerty argued the cause and filed a brief for respondent.*

JUSTICE STEVENS delivered the opinion of the Court.

In *Golden State Transit Corp.* v. *Los Angeles*, 475 U. S. 608 (1986) *(Golden State I)*, we held that the respondent city had violated federal law by conditioning the renewal of petitioner's taxicab franchise on settlement of a pending labor dispute between petitioner and its union. On remand, the District Court enjoined the city to reinstate the franchise but concluded that 42 U. S. C. § 1983 (1982 ed.)[1] did not authorize an award of compensatory damages. The court reasoned that "the supremacy clause does not create individual rights that may be vindicated in an action for damages under

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**Kenneth S. Geller, Andrew J. Pincus, Stuart E. Abrams, Daniel R. Barney, Robert Digges, Jr., Laurie T. Baulig,* and *William S. Busker* filed a brief for the American Trucking Associations, Inc., as *amicus curiae* urging reversal.

Benna Ruth Solomon and *Charles Rothfeld* filed a brief for the National League of Cities et al. as *amici curiae*.

[1] Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983," 660 F. Supp. 571, 578 (CD Cal. 1987), and that even though the city's conduct was pre-empted by the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. V), a § 1983 cause of action did not lie because there had been no "direct violation" of the statute and because the Act's comprehensive enforcement scheme precluded resort to § 1983.[2] The Court of Appeals affirmed. 857 F. 2d 631 (CA9 1988). We granted certiorari limited to the question whether the NLRA granted petitioner rights enforceable under § 1983. 489 U. S. 1010 (1989).

I

Section 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights. We have repeatedly held that the coverage of the statute must be broadly construed. See, *e. g.*, *Felder* v. *Casey*, 487 U. S. 131, 139 (1988); *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980);

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[2] "As the City correctly notes, it did not, and could not, violate the NLRA, or Section 8(d) specifically, since it was not a party to the collective bargaining agreement between Golden State and its Teamster drivers but rather was merely a collateral third party to the collective bargaining process. Section 8(d) of the NLRA does not create rights and obligations with respect to third parties who are not parties to a collective bargaining agreement but who, in some way, come in contact with the collective bargaining process. Rather, Section 8(d) defines the concept of collective bargaining and the obligations of the parties engaged in collective bargaining, and, in the language at issue in this case, states that the failure to make a concession during collective bargaining negotiations is not an unfair labor practice. Thus, while the Supreme Court in this case relied on Section 8(d) in holding that the City's action was preempted because it would have the effect of forcing a bargaining concession by Golden State, it would strain the language and purpose of the NLRA and misconstrue the import of the Supreme Court opinion to find that the City 'directly violated' Section 8(d) solely by virtue of the fact that it took some action preempted by that section." 660 F. Supp., at 578–579.

cf. *United States* v. *Price*, 383 U. S. 787, 801 (1966). It provides a remedy "against all forms of official violation of federally protected rights." *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 700–701 (1978).

A determination that § 1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First, the plaintiff must assert the violation of a federal right. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19 (1981). Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19 (1981). The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 431–432 (1987). We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff. *Id.*, at 430; see also *id.*, at 433 (O'CONNOR, J., dissenting) (citing *Cort* v. *Ash*, 422 U. S. 66, 78 (1975)).

Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," *Smith* v. *Robinson*, 468 U. S. 992, 1005, n. 9 (1984), by providing a "comprehensive enforcement mechanis[m] for protection of a federal right," *id.*, at 1003; see also *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). The availability of administrative mechanisms to protect the plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. See *Wright*, 479 U. S., at 425–428; cf. *Rosado* v. *Wyman*, 397 U. S. 397, 420 (1970).

Rather, the statutory framework must be such that "[a]llowing a plaintiff" to bring a § 1983 action "would be inconsistent with Congress' carefully tailored scheme." *Smith*, 468 U. S., at 1012. The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant. See *Wright*, 479 U. S., at 423; *National Sea Clammers*, 453 U. S., at 21, n. 31. "'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright*, 479 U. S., at 423–424 (quoting *Smith* v. *Robinson*, 468 U. S., at 1012).

Respondent argues that the Supremacy Clause,[3] of its own force, does not create rights enforceable under § 1983. We agree. "[T]hat clause is not a source of any federal rights"; it "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 613 (1979); see also *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965).[4] Given the variety of situations in which pre-

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[3] Article VI, cl. 2, of the United States Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[4] *Chapman* involved the predecessor to 28 U. S. C. § 1343(a)(3) (1982 ed)., the jurisdictional counterpart to § 1983, which provides jurisdiction over civil actions "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." We observed that if the first prepositional phrase, referring to constitutional claims, included rights secured solely by the Supremacy Clause, the additional language, providing jurisdiction for claims based on Acts of Congress providing for equal rights of citizens, would have been superfluous. See *Chapman*, 441 U. S., at 615. In order to give meaning to the entire statute, we held that the reference to constitutional claims therefore did not include rights secured

emption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority. Conversely, the fact that a federal statute has pre-empted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.

In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce," *Wright*, 479 U. S., at 432, is intended to benefit the putative plaintiff, and is not foreclosed "by express provision or other specific evidence from the statute itself," *id.*, at 423.

II

The nub of the controversy between the parties is whether the NLRA creates "rights" in labor and management that are protected against governmental interference. The city does not argue, nor could it, that a § 1983 action is precluded by the existence of a comprehensive enforcement scheme. Although the National Labor Relations Board (NLRB or Board) has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against governmental interference.[5] There is thus no comprehen-

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solely by the Supremacy Clause. *Ibid.* The same is true with respect to § 1983. If the Supremacy Clause itself were understood to secure constitutional rights, the reference to "and laws" would have been wholly unnecessary. It follows that a Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates "rights, privileges, or immunities" in the particular plaintiff.

[5] The Court of Appeals was thus mistaken in ruling that because the NLRB has exclusive jurisdiction to redress violations of the NLRA by labor and management, the federal courts do not have jurisdiction to address claims of governmental interference with interests protected by

sive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy. Nor can there be any substantial question that our holding in *Golden State I* that the city's conduct was pre-empted was within the competence of the judiciary to enforce. Rather, the city argues that it cannot be held liable under § 1983 because its conduct did not violate any rights secured by the NLRA. On the basis of our previous cases, we reject this argument. We agree with petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983.

In the NLRA, Congress has not just "occupied the field" with legislation that is passed solely with the interests of the general public in mind. In such circumstances, when congressional pre-emption benefits particular parties only as an incident of the federal scheme of regulation, a private damages remedy under § 1983 may not be available. The NLRA, however, creates rights in labor and management both against one another and against the State.[6] By its terms, the Act confers certain rights "generally on employees and not merely as against the employer." *Hill* v. *Florida ex rel. Watson*, 325 U. S. 538, 545 (1945) (Stone, J., concurring in part and dissenting in part); see also *Motor Coach Employees* v. *Missouri*, 374 U. S. 74 (1963); *Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340

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the Act. Our cases have repeatedly stressed the distinctions between the two types of claims, see *Brown* v. *Hotel Employees*, 468 U. S. 491, 503 (1984); *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 145, n. 6 (1976); *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 382, n. 17 (1969).

[6] Section 1(b) of the Taft-Hartley Act, 29 U. S. C. § 141(b) (1982 ed.), states in pertinent part:

"It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ."

U. S. 383 (1951); *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 458 (1950). We have thus stated that "[i]f the state law regulates conduct that is actually protected by federal law, . . . pre-emption follows . . . as a matter of substantive right." *Brown* v. *Hotel Employees*, 468 U. S. 491, 503 (1984). The rights protected against state interference, moreover, are not limited to those explicitly set forth in § 7 as protected against private interference. "The NLRA . . . has long been understood to protect a range of conduct against state but not private interference." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 290 (1986). See also *New York Telephone Co.* v. *New York Dept. of Labor*, 440 U. S. 519, 552 (1979) (Powell, J., dissenting) ("What Congress left unregulated is as important as the regulations that it imposed. It sought to leave labor and management essentially free to bargain for an agreement to govern their relationship"). And, contrary to the city's contention, "'[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 147 (1976) (quoting *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 317 (1965)).

Golden State I was based on the doctrine that is identified with our decision in *Machinists* v. *Wisconsin Employment Relations Comm'n*, *supra*. That doctrine is fundamentally different from the rule of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that state jurisdiction over conduct arguably protected or prohibited by the NLRA is pre-empted in the interest of maintaining uniformity in the administration of the federal regulatory jurisdiction. See *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 382, n. 17 (1969).[7] In *Machinists*, we reit-

[7] *Garmon* pre-emption divests a state court of jurisdiction over actions where the state law prohibits the same conduct that is arguably prohibited by the NLRA, see *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, 193–198 (1978); *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 510 (1983), and

erated that Congress intended to give parties to a collective-bargaining agreement the right to make use of "economic weapons," not explicitly set forth in the Act, free of governmental interference. 427 U. S., at 150. "[T]he congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." *Id.*, at 155. The *Machinists* rule creates a free zone from which all regulation, "whether federal or State," *id.*, at 153, is excluded.[8]

The city's contrary argument, that the NLRA does not secure rights against the State because the duties of the State are not expressly set forth in the text of the statute, is not persuasive. We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of labor and management against governmental interference. While it is true that the rule of the *Machinists* case is not set forth in the specific text of an enumerated section of

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actions involving conduct arguably protected under the NLRA provided the injured party has a means of bringing the dispute before the Board, see *Longshoremen* v. *Davis*, 476 U. S. 380, 393, n. 10 (1986). This preemption rule "avoids the potential for jurisdictional conflict between state courts or agencies and the NLRB by ensuring that primary responsibility for interpreting and applying this body of labor law remains with the NLRB." *Brown* v. *Hotel Employees*, 468 U. S., at 502. "Apart from notions of 'primary jurisdiction,' there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct prohibited by the federal Act." *Sears, Roebuck*, 436 U. S., at 199 (footnote omitted).

[8] Referring to the substantive aspects of the collective-bargaining process, we wrote:

"Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.' [*NLRB* v. *Insurance Agents*, 361 U. S. 477, 498 (1960).] Rather, both are without authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' *id.*, at 497 (footnote omitted), or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' *Id.*, at 500." *Machinists*, 427 U. S., at 149–150.

the NLRA, that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language. A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation of a right that is clearly set forth in the text of the statute.

The *Machinists* rule is not designed—as is the *Garmon* rule—to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty. As much as the welfare benefits in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), and the right to a prescribed portion of rent in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418 (1987), the interest in being free of governmental regulation of the "peaceful methods of putting economic pressure upon one another," *Machinists*, 427 U. S., at 154, is a right specifically conferred on employers and employees by the NLRA.[9] Of course, Congress has the authority to retract the statutorily conferred liberty at will, just as the State in *Wright* and *Thiboutot* could relieve itself of federal obligations by declining federal funds. Cf. *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582, 596 (1983) (opinion of WHITE, J.); *Rosado* v. *Wyman*, 397 U. S., at 420. But while the rule remains in effect, it is a guarantee of freedom for private conduct that the State may not abridge.

As we held in *Golden State I*, respondent's refusal to renew petitioner's franchise violated petitioner's right to use permissible economic tactics to withstand the strike. Because

[9] Cf. *Bomar* v. *Keyes*, 162 F. 2d 136 (CA2) (L. Hand, J.) (statutory privilege to sit on federal jury protected against interference by State), cert. denied, 332 U. S. 825 (1947).

the case does not come within any recognized exception from the broad remedial scope of § 1983, we reverse the judgment of the Court of Appeals. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The majority concludes that 42 U. S. C. § 1983 (1982 ed.) requires the city of Los Angeles to pay compensatory damages to Golden State Transit Corp. for violating the company's right under the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. V), to employ economic weapons in collective bargaining without state interference. With all respect, I dissent. Although I agree with much of the majority's discussion of both § 1983 and the NLRA, I do not consider these statutes to provide Golden State a remedy.

Our decision in *Golden State Transit Corp.* v. *Los Angeles*, 475 U. S. 608 (1986) *(Golden State I)*, held that the city had no power to condition the renewal of Golden State's operating franchise upon the settlement of the company's labor dispute because imposing such a condition would interfere with the NLRA. Although the city's lack of power in a sense immunized Golden State from interference by the city, in my view the NLRA did not secure this immunity within the meaning of § 1983. The District Court, however, had jurisdiction to enjoin the city's pre-empted action under other federal statutes.

I

From the earliest cases interpreting our constitutional law to the most recent ones, we have acknowledged that a private party can assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States. A litigant

has standing to contend that proper allocation of power requires a particular outcome in a dispute, and this is so whether the dispute is between individual parties, see *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880), or the dispute involves a State or its subdivisions, see *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1852); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973); *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978). The injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system.

I submit that the Court should not interpret § 1983 to give a cause of action for damages when the only wrong committed by the State or its local entities is misapprehending the precise location of the boundaries between state and federal power. The dispute over the taxicab franchise involves no greater transgression than this. The NLRA, through preemption, did create a legal interest in Golden State, an interest which the city infringed, but it does not follow that Golden State may obtain relief under § 1983.

II

The NLRA creates two relations which encompass different legal interests. The statute creates the first relation between Golden State and the striking union. The statute establishes duties that Golden State and the union have to each other and, as correlatives of these duties, rights that they have against each other. Under the NLRA, for example, each has a duty to bargain in good faith and, as correlatives of these duties, each has a right to have the other bargain in good faith. See 29 U. S. C. § 158(d) (1982 ed.). The Court of Appeals was correct to determine that the allegations of injury in this case do not implicate the rights and duties

which flow from this first legal relation. See 857 F. 2d 631, 635 (CA9 1988).

The NLRA also creates a jural relation between the city and Golden State. Although the NLRA does not provide in any detailed way how a city should act when renewing an operating franchise, the statute does have a pre-emptive effect under the Supremacy Clause. When we analyzed this pre-emption in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), we ruled that, although the NLRB affords the States the power to regulate activities within its peripheral concern, *id.*, at 137, the States have no such power or authority to influence the substantive terms of collective-bargaining agreements, *id.*, at 147–151. Applying *Machinists* in *Golden State I*, we held that the city has no power to interfere with the NLRA by conditioning Golden State's franchise renewal upon settlement of a labor dispute. See 475 U. S., at 618.

The city's lack of power gives rise to a correlative legal interest in Golden State that we did not discuss in *Golden State I*. The majority has chosen to call the interest a right. See *ante*, at 112. I would prefer to follow the familiar Hohfeldian terminology and say that Golden State has an immunity from the city's interference with the NLRA. See Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L. J. 16, 55–58 (1913) (defining the correlative of no power as an immunity). This terminology best reflects Congress' intent to create the free zone of bargaining we described in *Machinists*. See 427 U. S., at 153.

III

Section 1983 provides a federal remedy only for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The case before us today asks how § 1983 applies to claims of pre-emption. We have not answered this question in other decisions, but we have ruled that "an allegation of incompatibility between federal and

state statutes and regulations does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of [28 U. S. C.] § 1343" or, as the majority agrees, within the meaning of § 1983. *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 615 (1979) (discussing 28 U. S. C. § 1343(3) (1976 ed.), the jurisdictional counterpart to § 1983). The pre-emptive federal statute, instead, must secure a right, privilege, or immunity in order for § 1983 to provide a remedy. 441 U. S., at 615.

The preceding analysis shows that Golden State has an immunity that arose out of a relation created by the NLRA. Unlike the majority, however, I do not think that the NLRA secures this immunity as contemplated by *Chapman*. Section 1983 uses the word "secure" to mean "protect" or "make certain," *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 526–527 (1939) (opinion of Stone, J.), in the sense of securing to "any person, any individual rights," *Carter* v. *Greenhow*, 114 U. S. 317, 322 (1885). The section thus distinguishes secured rights, privileges, and immunities from those interests merely resulting from the allocation of power between the State and Federal Governments. Representative Shellabarger, who sponsored the bill that became § 1983, see Cong. Globe, 42d Cong., 1st Sess., 317 (1871), recognized and explained the distinction as follows:

> "Most of the provisions of the Constitution, which restrain and directly relate to the States, such as those in the tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque,' 'coin money,' 'emit bills of credit,' &c., relate to the divisions of the political powers of the States and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State

> acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States." *Id.*, at App. 69.

Representative Shellabarger spoke only of interests secured by the Constitution. Our cases in recent years have expanded the scope of § 1983 beyond that contemplated by the sponsor of the statute and have identified interests secured by various statutory provisions as well. See, *e. g.*, *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 431–432 (1987) (right to particular calculation of rent in public housing secured by the Brooke Amendment to the United States Housing Act of 1937, 42 U. S. C. § 1437a (1982 ed. and Supp. V)); *Maine* v. *Thiboutot*, 448 U. S. 1, 2–3 (1980) (right to benefits secured by the Social Security Act, 42 U. S. C. § 602(a)(7) (1976 ed.)). None of these secured statutory interests, however, has been the sole result of a statute's pre-emptive effect, as has Golden State's immunity from the city's interference.

Pre-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals. Although the majority finds the *Machinists* pre-emption doctrine "akin to a rule that denies either sovereign the authority to abridge a personal liberty," *ante*, at 112, and describes the interest of being free of governmental regulation as a right specifically conferred by the NLRA on employers and employees, *ibid.*, I cannot agree that federal law secures this legal interest within the meaning of § 1983.

Golden State does not and cannot contend that a federal statute protects it from the city's primary conduct apart from its governmental character. *Machinists*' pre-emption, as noted above, rests upon the allocation of power rather than

upon individual rights, privileges, or immunities. See *Machinists*, 427 U. S., at 137, 147–151. The dispute between Golden State and the city exists because the Federal Government has exercised its power under the Commerce Clause to regulate Golden State's labor relations under the NLRA and thus has deprived the city of the power to effect its own regulations of these relations. Although our recent decisions in *Wright* and *Thiboutot* suggest that Congress could secure individual interests in Golden State through a statute, Congress did not secure them in the NLRA.

Golden State's immunity, as defined in *Machnists*, has nothing to do with the substance of the requirement imposed on its collective bargaining. The immunity, for instance, would not prevent the United States from exercising its power under the Commerce Clause to authorize the actions taken by the city. The immunity, rather, permits the company to object only that the wrong sovereign has attempted to regulate its labor relations. Golden State's immunity does not benefit the company as an individual, but instead results from the Supremacy Clause's separate protection of the federal structure and from the division of power in the constitutional system. Federal law, as such, does not secure this immunity to Golden State within the meaning of § 1983.

The case before us differs from one in which the governmental character of the action itself constitutes only an element in the primary wrong that the injured party seeks to vindicate under the Constitution. See, *e. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961). So too is this case unlike statutory cases such as *Maine* v. *Thiboutot*. The plaintiffs in *Thiboutot* sued state officials under § 1983 for withholding welfare benefits in violation of the Social Security Act, in particular, 42 U. S. C. § 602(a)(7) (1976 ed.). They claimed, in so many words, that the Social Security Act imposed upon the defendants a duty to the plaintiffs to pay the benefits and, as correlative of this duty, gave the plaintiffs a right against the defendants to have benefits paid. 448 U. S., at 2–3.

The Court's expansive interpretation of § 1983 allowed the plaintiffs to recover damages for the deprivation of this statutory right. *Id.*, at 4. The *Thiboutot* case, however, provides no help to Golden State. The NLRA affords Golden State no counterpart to the plaintiffs' individual interests in the Social Security benefits.

IV

By concluding that Golden State may not obtain relief under § 1983, we would not leave the company without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 does not provide the exclusive relief that the federal courts have to offer. When we held in *Golden State I* that the company could survive summary judgment on a *Machinists* doctrine pre-emption claim, we did not purport to make a ruling with respect to § 1983 and did not even cite the provision. Our omission of any discussion of § 1983 perhaps stemmed from a recognition that plaintiffs may vindicate *Machinists* pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U. S. C. § 1331 (1982 ed.); 28 U. S. C. § 2201; 28 U. S. C. § 2202 (1982 ed.); *New York Telephone Co.* v. *New York Dept. of Labor*, 440 U. S. 519, 525 (1979) (plaintiff sought declaratory and injunctive relief on a *Machinists* pre-emption claim). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983. Because Golden State asked for such relief in its complaint, see App. 6, 7, 17, the District Court had jurisdiction to enter the injunction on behalf of the company, but not for the reasons that it stated. As it is my view that Golden State does not have a claim under § 1983, I dissent.

PAVELIC & LeFLORE *v.* MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORP., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-791. Argued October 2, 1989—Decided December 5, 1989

Federal Rule of Civil Procedure 11 provides in pertinent part that pleadings and other papers shall be signed by at least one attorney of record in the attorney's individual name, which signature shall certify that he or she has read the paper and believes it to be well grounded in fact and law; and that, "[i]f a . . . paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction." In the present case, the District Court imposed a Rule 11 monetary sanction against the law firm of the signing attorney, rejecting the firm's contention that it could be imposed only against the individual signer. The Court of Appeals affirmed.

Held: When read in the context of all of Rule 11's signature provisions, the phrase "person who signed" connotes the individual signer mentioned at the outset of the Rule and authorizes a court to impose a sanction only against that individual. That is so even when the individual explicitly signs *on behalf of* the firm, since it is only the signature *"in the attorney's individual name"* which complies with the Rule's requirement and to which the latter portions of the Rule attach consequences. Pp. 123-127.

854 F. 2d 1452, reversed in part and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 127.

Jacob Laufer argued the cause for petitioner. With him on the briefs was *Patricia M. Karish.*

Norman B. Arnoff argued the cause for respondents and filed a brief for respondent Shukat. *Robert B. McKay* and *Sol V. Slotnik* filed a brief for respondents Marvel Entertainment Group et al.

JUSTICE SCALIA delivered the opinion of the Court.

Federal Rule of Civil Procedure 11 provides in part: "If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction . . . ." In this case we must determine whether Rule 11 authorizes a court to impose a sanction not only against the individual attorney who signed, but also against that attorney's law firm.

I

The action giving rise to the current controversy was instituted by plaintiff Northern J. Calloway against respondents for willful copyright infringement of his motion picture script and other related claims. The original complaint—signed and filed by Calloway's attorney, Ray L. LeFlore—alleged that Calloway had developed an idea for a motion picture and written a script, and that respondents had begun to develop this work without his permission. Respondents filed a motion to dismiss, pointing to a series of documents annexed to the complaint that gave them the right to develop the work commercially. The District Court dismissed the complaint (with leave to refile), not on the ground that the documents authorized the alleged infringement, but because Calloway's complaint had failed to specify the registration number of his copyright and the dates upon which the alleged acts of infringement had occurred.

An amended complaint, again signed by LeFlore, was filed several weeks later. In addition to remedying the defects that were the basis of dismissal, it newly asserted that Calloway's signatures on the documents purporting to grant an option had been forged by respondents, and included that among the actions for which damages were sought. Plaintiff relied on this forgery claim in opposing respondents' motions to dismiss and motions for summary judgment.

In October 1984, LeFlore joined with Radovan Pavelic to form the law partnership of Pavelic & LeFlore. Thereafter, all court papers in the case were signed:

"Pavelic & LeFlore
By /s/ Ray L. LeFlore
(A Member of the Firm)
Attorneys for Plaintiff."

Several of these papers, including interrogatory responses and a proposed pretrial order, continued to rely upon the allegation of forgery. At trial, the District Court found insufficient evidence to support that contention, and directed a verdict in favor of respondents on that issue. The jury returned a verdict against plaintiff on all remaining claims.

Upon respondents' motion and after a hearing, the District Court imposed a Rule 11 sanction in the amount of $100,000 against Pavelic & LeFlore on the ground that the forgery claim had no basis in fact and had not been investigated sufficiently by counsel. Radovan Pavelic moved to relieve the firm of the sanction, contending that (1) the firm did not exist during a major portion of the litigation and therefore was not fully responsible for the Rule 11 violations, and (2) Rule 11 empowers the court to impose a sanction only upon the attorney who signed the paper, not upon that attorney's law firm. The District Court accepted the first contention, and therefore amended its order to shift half of the sanction from the firm to LeFlore. It rejected the second contention, however, concluding that Rule 11 sanctions may be imposed "on both the individual attorney and the law firm on whose behalf he signed the papers." *Calloway* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 650 F. Supp. 684, 687 (SDNY 1986).

The Court of Appeals for the Second Circuit affirmed, 854 F. 2d 1452, 1479 (1988), thus placing itself in square disagreement with an earlier holding of the Fifth Circuit that Rule 11 authorizes sanctions against no attorney other than the individual lawyer or lawyers who sign court papers, see *Robin-*

son v. *National Cash Register Co.*, 808 F. 2d 1119, 1128–1130 (1987). We granted certiorari, 489 U. S. 1009 (1989).

II

We give the Federal Rules of Civil Procedure their plain meaning, *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 750, n. 9 (1980), and generally with them as with a statute, "[w]hen we find the terms . . . unambiguous, judicial inquiry is complete," *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). The specific text of Rule 11 at issue here is the provision that requires a court, when a paper is signed in violation of the Rule, to "impose upon the person who signed it . . . an appropriate sanction." Thus viewed in isolation, the phrase "person who signed" is ambiguous as to the point before us today. That is not so, however, when it is read in the total context of all the provisions of Rule 11 dealing with the signing of filings. Those provisions (all of Rule 11 except two sentences) are as follows:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the at-

> tention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

In other contexts the phrase "the person who signed it" might bear the somewhat technical legal meaning of the natural or juridical person in whose name or on whose behalf the paper was signed; but in a paragraph beginning with a requirement of individual signature, and then proceeding to discuss the import and consequences of signature, we think references to the signer in the later portions must reasonably be thought to connote the individual signer mentioned at the outset. It is as strange to think that the phrase "person who signed" in the last sentence refers to the partnership represented by the signing attorney, as it would be to think that the earlier phrase "the signer has read the pleading" refers to a reading not necessarily by the individual signer but by someone in the partnership; or that the earlier phrase "[i]f a pleading . . . is not signed" refers not to an absence of individual signature but to an absence of signature on behalf of the partnership. Just as the requirement of signature is imposed upon the individual, we think the recited import and consequences of signature run *as to him.*

Respondents' interpretation is particularly hard to square with the text since they do not assert that "the person who signed," and who "shall" be sanctioned under the Rule, is *only* the partnership (that would obviously be unacceptable), but rather is *either* the partnership *or* the individual attorney, *or* both, at the court's option. But leaving that option unexpressed seems quite inconsistent with the extreme care with which the Rule, in the very same sentence, makes clear

that the mandatory sanction must extend to "the person who signed [the paper], a represented party, or both." It is surely puzzling why the text would be so precise about that but leave to speculation whether only the individual attorney or his firm or both can be sanctioned. The puzzlement does not exist, of course, if "the person who signed" means *only* the individual attorney.

Respondents appeal to "long and firmly established legal principles of partnership and agency," Brief for Respondents Marvel Entertainment Group et al. 29, under which all the members of a partnership are liable for the authorized acts of a partner or employee, see Restatement (Second) of Agency § 140 (1958). We are not dealing here, however, with common-law liability, but with a Rule that strikingly departs from normal common-law assumptions such as that of delegability. The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment. Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed. We think that to be the fair import of the language here.

Respondents also rely upon the fact that after formation of the partnership LeFlore's signature was explicitly *on behalf of* the firm. The simple response is that signature on behalf of the firm was not a signature that could comply with the first sentence of the Rule, and not a signature to which the later portions of the Rule attach consequences. Rule 11 says that papers must be signed "by at least one attorney of record *in the attorney's individual name*." (Emphasis added.) Even if LeFlore's signature in the fashion indicated had the effect of making the firm and all its partners (including himself) attorneys of record, it is only his signature *in his individual name* that satisfies the first sentence of the Rule, and

it is that signature, in that individual capacity, to which the later portions of the Rule refer. It has long been thought the better practice for the attorney complying with Rule 11 not to sign *for* his firm, but to sign in his individual name and on his own behalf, with the name of his firm beneath. See Gavit, The New Federal Rules and State Procedure, 25 A. B. A. J. 367, 371 (1939) (Under Rule 11, "the practice for pleadings to be signed in the name of a partnership" is "undesirable" and "improper").

Respondents, and the opinion of the Court of Appeals, rely heavily upon the contention that the policies underlying Rule 11 will best be served by holding a law firm accountable for its attorney's violation. In the Court of Appeals' words, "[law firm] responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims." 854 F. 2d, at 1480. Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it.

But in any event it is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit

upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone*, is precisely the point of Rule 11. Moreover, psychological effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (if he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him. To be sure, the partnership's knowledge that it was subject to sanction might induce it to increase "internal monitoring," but one can reasonably believe that more will be achieved by directly increasing the incentive for the individual signer to take care. Such a belief is at least not so unthinkable as to compel the conclusion that the Rule does not mean what it most naturally seems to say.

For the foregoing reasons, the judgment of the Second Circuit is reversed insofar as it allows Rule 11 sanctions to be imposed against Pavelic & LeFlore. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, dissenting.

We have consistently held that a trial judge bears the primary responsibility for managing the cases before him. One of the fundamental purposes of Rule 11 is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case. The Court's interpretation of Rule 11, in contrast, is overly restrictive, as it reads into the Rule an absolute immunity for law firms from any sanction for their misconduct.

Although the Court recognizes that the relevant phrase in Rule 11—"the person who signed" the pleading, motion, or paper at issue—could mean a *juridical* person on whose be-

half the document is signed, *ante*, at 124, it nonetheless finds that the phrase has a more limited meaning in the context of the Rule as a whole. As I cannot acquiesce in such an unnecessary erosion of the discretion of federal trial judges, I dissent.

The Court's reading of the "plain meaning" of Rule 11 is based entirely on the connection it perceives between the language at the beginning of the Rule, which refers to an individual "'signer,'" and the crucial language in the last sentence, which allows a court to impose sanctions on "'the person who signed'" a pleading or paper. *Ante*, at 123–124. Although the text of the Rule does not foreclose the reading the Court finds compelling, that interpretation is by no means the only reasonable one—and certainly is not required by the "plain meaning." Significantly, in three separate places the Rule identifies the person signing a document as the "signer." Yet it uses an entirely different phrase, "the person who signed" the pleading, in its listing of parties who may be sanctioned for violations, thereby drawing an explicit distinction between the two phrases. If the drafters had intended to limit the entity that could be sanctioned under the Rule to the individual signer, they easily could have repeated the word "signer" a fourth time. The use of different phrases may reasonably be viewed as an indication of two different meanings. In the case of "signer," the drafters unambiguously sought to refer to the individual who actually signed the document; in their subsequent use of the phrase "the person who signed," the drafters may have signaled their intent to allow a court to impose sanctions on any juridical person, including the law firm of the individual signer. In the context of the Federal Rules of Civil Procedure, drafted by a committee familiar with traditional legal concepts, one can reasonably assume that the word "person" indicates more than just natural persons, encompassing partnerships and professional corporations as well. See, *e. g.*, 5 U. S. C. § 551(2) (Administrative Procedure Act defines

"person" as an "individual, partnership, corporation, association, or public or private organization other than an agency"); N. Y. Partnership Law § 2 (McKinney 1988) (defining "person" to include "individuals, partnerships, corporations, and other associations"). At the least, an interpretation of Rule 11 that gives "person" its legal meaning is no less plausible than the majority's more restrictive reading of the Rule.

The purposes of the Rule support this construction of Rule 11. All pleadings, motions, and papers must be signed by an attorney in his *individual* name. This requirement serves in part the administrative goal of identifying for the court one person who can answer questions about the papers. Because Rule 11 proceedings often occur at the end of litigation, see Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 129 (1982 ed., Supp. V), it will often be crucial that the relevant documents, which may have been filed months or even years earlier, identify a specific individual with knowledge of their contents. No such administrative concerns suggest that the phrase "the person who signed" the paper should be restricted to an individual.

Furthermore, as the majority emphasizes, *ante*, at 126, the requirement of an individual signer promotes a measure of individual accountability by ensuring that someone takes direct responsibility for each filing. Yet encouraging individual accountability and firm accountability are not mutually exclusive goals. Indeed, individual accountability may be heightened when an attorney understands that his carelessness or maliciousness may subject *both* himself and his firm to liability. The concern that a person take direct responsibility for each paper is not disserved by holding the law firm responsible in cases where the district court determines that both are blameworthy. In short, it is not internally inconsistent, nor does it inevitably lead to "puzzling" results, *ante*, at 125, to allow a trial judge the discretion to impose sanctions on a law firm, a juridical person, for which a signing attorney acts as agent.

The policies underlying Rule 11 decisively indicate that "person" should be interpreted broadly so that a court can effectively exercise discretion in formulating appropriate sanctions. Although, as the majority infers from the Rule's text, one purpose of Rule 11 may be "to bring home" to the individual signer his personal responsibility for complying with its dictates, *ante*, at 126, the Rule is *explicitly* designed to deter improper pleadings, motions, and papers. Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 129 (1982 ed., Supp. V) ("The word 'sanctions' in the caption . . . stresses a deterrent orientation in dealing with improper pleadings"). Admittedly, in some cases, sanctions imposed solely on the individual signer may halt abusive practices most effectively. In other cases, however, deterrence might best be served by imposing sanctions on the signer's law firm in an attempt to encourage internal monitoring. The trial judge is in the best position to assess the dynamics of each situation and to act accordingly.

Recognizing the need to tailor the sanction to each particular situation, the Advisory Committee emphasized in a related context the need for "flexibility" in dealing with violations. See *ibid.* (discussing the effect of the words "shall impose" on the trial court's discretion to impose sanctions). Flexibility is no less important when a judge decides whether one, some, or all of the many entities before him should be held responsible for improper pleadings, motions, or papers. Where, as here, the Rule itself does not demand rigidity, it is unwise for the Court to constrict the options available to a trial judge faced with a violation of Rule 11. The judge who observes improper behavior and who is intimately familiar with the facts of a case should be allowed to fashion the penalty that most effectively deters future abuse. Today's decision unwisely ties the hands of trial judges who must deal frequently and immediately with Rule 11 violations and ill serves the goal of administering that Rule justly and efficiently. See Fed. Rule Civ. Proc. 1.

The District Court apportioned the sanction here between the signing attorney and his law firm, based on its assessment of the relative culpability of each. *Calloway* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 650 F. Supp. 684 (SDNY 1986). I firmly believe that this sort of penalty is precisely what Rule 11 contemplates. I therefore cannot join the Court's reading of the Rule which creates an immunity for law firms from its coverage.

UNITED STATES *v.* GOODYEAR TIRE & RUBBER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 88–1474. Argued November 1, 1989—Decided December 11, 1989

In 1970 and 1971, Goodyear Tyre and Rubber Company (Great Britain) Limited (Goodyear G. B.), a wholly owned subsidiary of Goodyear Tire and Rubber Company (Goodyear), a domestic corporation, filed income tax returns in, and paid taxes to, the United Kingdom and the Republic of Ireland. It also distributed dividends to Goodyear, its sole shareholder, which Goodyear reported on its federal tax return. Thereafter Goodyear sought an indirect credit for a portion of the foreign taxes paid by Goodyear G. B. as permitted by § 902 of the Internal Revenue Code (Code), 26 U. S. C. § 902 (1970 ed.), which limits a domestic parent corporation's credit to the amount of tax paid by the subsidiary attributable to the dividend issued. The credit is calculated by multiplying the total foreign tax paid by that portion of the subsidiary's after-tax "accumulated profits" that is actually issued to the domestic parent in the form of a taxable dividend. After Goodyear G. B. carried back a net loss reported on its 1973 British tax return to offset portions of its 1970 and 1971 income, British taxing authorities recalculated its 1970 and 1971 income and tax liability, and the company received a refund for those years. Pursuant to § 905(c) of the Code—which permits redetermination of the foreign tax credit whenever any tax paid is refunded—the Commissioner of Internal Revenue recalculated the indirect tax credit available to Goodyear for 1970 and 1971 by lowering the foreign taxes paid to reflect the refund. However, he refused to lower accumulated profits for those years to reflect the British tax authorities' redetermination because, applying United States tax principles, Goodyear G. B.'s loss would not have been allowable had the company been a domestic corporation filing a federal tax return. Thus, the Commissioner assessed, and Goodyear paid, tax deficiencies for 1970 and 1971. Goodyear subsequently sought a refund in the Claims Court, which rejected Goodyear's claim that foreign tax law principles govern the calculation of "accumulated profits" in § 902's tax credit, finding instead that the purposes underlying § 902 favored calculation of "accumulated profits" in accordance with United States tax concepts. The Court of Appeals reversed, holding that the "plain meaning" of § 902 required that "accumulated profits" be determined under foreign law. It also held that the congressional

purpose underlying § 902 to eliminate international double taxation would be defeated if a foreign subsidiary's taxes, but not its "accumulated profits," were calculated under foreign law.

Held: "Accumulated profits," as that term appears in § 902's indirect tax credit, are to be calculated in accordance with domestic tax principles. Pp. 138–145.

(a) Section 902's text does not resolve how "accumulated profits" are to be calculated, since it relates such profits both to the foreign tax paid by the subsidiary, calculated in accordance with foreign law, and to the dividend issued by the subsidiary, calculated in accordance with domestic law. Pp. 138–139.

(b) No definitional approach to "accumulated profits" uniformly and unqualifiedly satisfies the indirect credit's dual congressional purposes, as clearly demonstrated by the credit's history, of protecting a domestic parent from double taxation of its income and treating foreign branches and foreign subsidiaries alike in terms of the tax credits they generate for their domestic companies. Goodyear correctly claims that calculating such profits according to domestic tax principles can result in situations in which § 902's statutory goal of avoiding double taxation will be disserved. However, as the Government contends, defining the profits in terms of foreign tax principles can unfairly advantage domestic companies that operate through foreign subsidiaries over those that operate through unincorporated branches. Pp. 139–143.

(c) The Government's interpretation of "accumulated profits" is more faithful to congressional intent. The risk of double taxation is less substantial than the risk of unequal treatment. Goodyear offers no basis for its suggestion that double taxation—which can result only when a dividend is sourced to a year in which domestic tax concepts recognize little or no income and yet a subsidiary pays substantial foreign tax—commonly occurs. On the other hand, Goodyear's approach leads to unequal tax treatment of subsidiaries and branches whenever the foreign taxing authority calculates income more or less generously than the United States, a result that is difficult to square with the express congressional purpose of ensuring tax parity between corporations that operate through foreign subsidiaries and those that operate through foreign branches. The Government's approach is also supported by administrative interpretations of § 902 and by the statutory canon that tax provisions should generally be read to incorporate domestic tax concepts absent a clear congressional expression that foreign concepts control, *Biddle* v. *Commissioner*, 302 U. S. 573, 578. Pp. 143–145.

856 F. 2d 170, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace,* and *Robert S. Pomerance.*

Barring Coughlin argued the cause for respondents. With him on the brief were *Stephen L. Buescher* and *Deborah Z. Read.**

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we must decide whether "accumulated profits" in the indirect tax credit provision of the Internal Revenue Code of 1954, 26 U. S. C. § 902 (1970 ed.), are to be measured in accordance with United States or foreign tax principles. We conclude that "accumulated profits" are to be measured in accordance with United States principles.

I

Goodyear Tyre and Rubber Company (Great Britain) Limited (Goodyear G. B.) is a wholly owned subsidiary of Goodyear Tire and Rubber Company (Goodyear), a domestic corporation. Goodyear brought this suit seeking a refund of federal income taxes collected for the years 1970 and 1971. During those years, Goodyear G. B. filed income tax returns in, and paid taxes to, the United Kingdom and the Republic of Ireland. Goodyear G. B. also distributed dividends to Goodyear, its sole shareholder. Goodyear reported these dividends on its federal tax return, as required by 26 U. S. C. §§ 301, 316 (1970 ed.). Goodyear thereafter sought credit for a portion of the foreign taxes paid by Goodyear G. B. in the amount specified in § 902.[1]

**William H. Allen, John B. Jones, Jr., Frances M. Horner, Robert T. Cole,* and *Gilbert W. Rubloff* filed a brief for the National Foreign Trade Council, Inc., as *amicus curiae* urging affirmance.

Dennis I. Meyer, C. David Swenson, Leonard B. Terr, and *Thomas A. O'Donnell* filed a brief for Vulcan Materials Co. as *amicus curiae.*

[1] Section 902(a) provides:

Section 902 provides a parent of a foreign subsidiary with an "indirect" or "deemed paid" credit on its domestic income tax return to reflect foreign taxes paid by its subsidiary. The credit protects domestic corporations that operate through foreign subsidiaries from double taxation of the same income: taxation first by the foreign jurisdiction, when the income is earned by the subsidiary, and second by the United States, when the income is received as a dividend by the parent. In some circumstances, a foreign subsidiary may choose to distribute only a portion of its available profit as a dividend to its domestic parent. For that reason, a domestic parent cannot automatically claim credit for all foreign taxes paid by its subsidiary: § 902 limits a domestic parent's credit to the amount of tax paid by the subsidiary attributable to the dividend issued. The foreign tax deemed paid by the domestic parent is calculated by multiplying the total foreign tax paid (T) by that portion of the subsidiary's after-tax accumulated profits (AP – T) that is actually issued to the domestic parent in the form of a taxable dividend (D).[2]

"For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall—

"(1) to the extent such dividends are paid by such foreign corporation out of accumulated profits (as defined in subsection (c)(1)(A)) of a year for which such foreign corporation is not a less developed country corporation, be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid or deemed to be paid by such foreign corporation to any foreign country or to any possession of the United States on or with respect to such accumulated profits, which the amount of such dividends (determined without regard to section 78) bears to the amount of such accumulated profits in excess of such income, war profits, and excess profits taxes (other than those deemed paid). . . ." 26 U. S. C. § 902 (1970 ed.).

[2] The formula for calculating the § 902 credit is as follows:

$$\text{Credit} = \text{Foreign Taxes Paid (T)} \times \left(\frac{\text{Dividends (D)}}{\text{Accumulated Profits (AP) minus Foreign Taxes (T)}} \right)$$

In 1973, Goodyear G. B. reported a net loss on its British tax return and carried back that loss to offset substantial portions of its 1970 and 1971 income. Based on the 1973 carried-back losses, British taxing authorities recalculated Goodyear G. B.'s income and tax liability for the years 1970 and 1971. Goodyear G. B. thereafter received a refund of a substantial portion of its 1970 and 1971 foreign tax payments.

In response to the refunds, and pursuant to § 905(c) of the Code which permits redetermination of the foreign tax credit whenever "any tax paid is refunded in whole or in part," the Commissioner of Internal Revenue recalculated the indirect tax credit available to Goodyear for the tax years 1970 and 1971. The Commissioner lowered the foreign taxes paid (T) to reflect the refund. He refused, however, to lower accumulated profits (AP) for those years to reflect British tax authorities' redetermination of Goodyear G. B.'s income. The deductions that created, for British tax purposes, the 1973 loss would not have been allowable in the computation of United States income tax if Goodyear G. B. had been a United States corporation filing a United States return. See App. 19–29 (Stipulation of Facts). In the Commissioner's view, accumulated profits are to be calculated in accordance with United States tax principles; accordingly, the Commissioner regarded Goodyear G. B.'s 1970 and 1971 accumulated profits as unaffected by the deductions allowed under British law.

In view of the reduced amount of Goodyear's tax deemed paid, the Commissioner assessed substantial tax deficiencies for the tax years 1970 and 1971. Goodyear paid the deficiencies and, following the IRS' denial of its administrative refund claim, brought this action in the United States Claims Court, averring that foreign tax law principles govern the calculation of "accumulated profits" in § 902's tax credit. Calculating "accumulated profits" in accordance with British tax law principles, Goodyear maintained that Goodyear G. B.'s after-tax accumulated profits for 1970 and 1971 were

insufficient to cover the dividends paid in those years. In such a circumstance, § 902 requires that, for the purpose of computing the indirect credit, the excess of the dividend be deemed paid out of the after-tax accumulated profits of the preceding year. If in that year the remaining portion of the dividend exceeds the after-tax accumulated profits, the remainder of the dividend is allocated or "sourced" to the next most recent year, until the dividend is exhausted.[3] Thus, Goodyear argued that the dividends it received from Goodyear G. B. in 1970 and 1971 should have been sourced to prior tax years, 1968 and 1969, until Goodyear G. B.'s after-tax accumulated profits covered the dividends. Through this sourcing mechanism, Goodyear would, in computing its domestic tax liability for the dividends issued by Goodyear G. B., receive credit for a portion of the foreign taxes paid by Goodyear G. B. in 1968 and 1969. Because Goodyear G. B. paid substantial foreign taxes in those tax years, allocation of the dividend to those years would yield a tax deemed paid by Goodyear in excess of £1 million, over four times greater than the tax the Commissioner deemed paid. If the term "accumulated profits" is defined in accordance with domestic tax principles, as the Commissioner advocated, the dividends issued in 1970 and 1971 are fully exhausted by the accumulated profits of those years, resulting in a tax deemed paid of £247,124.

The Claims Court rejected Goodyear's claim. 14 Cl. Ct. 23 (1987). Viewing the statutory definition of "accumulated profits" in § 902(c)(1)(A) as inconclusive, *id.*, at 28–29, the court turned to the purposes underlying § 902 and found that they favored calculation of "accumulated profits" in accordance with United States tax concepts, *id.*, at 29–31. The Court of Appeals for the Federal Circuit reversed. 856 F. 2d 170 (1988). The court held that the "plain meaning" of § 902 "requires [accumulated profits] to be determined under

[3] The operation of this sourcing principle is described in *General Foods Corp.* v. *Commissioner*, 4 T. C. 209, 215 (1944).

foreign law." *Id.*, at 172. The court also held that the fundamental congressional purpose underlying § 902, "'elimination of international double taxation,'" *ibid.* (quoting *H. H. Robertson Co.* v. *Commissioner*, 59 T. C. 53, 74 (1972), aff'd, 500 F. 2d 1399 (CA3 1974)), would be defeated if the taxes paid by a foreign subsidiary, but not its accumulated profits, were calculated in terms of foreign law. 856 F. 2d, at 172.

The Court of Appeals' decision has important consequences for the calculation of the indirect tax credit of domestic parents that have received dividends from their subsidiaries abroad. To clarify the operation of the § 902 credit in the tax years to which it applies,[4] we granted certiorari, 490 U. S. 1045 (1989), and now reverse.

II

Our starting point, as in all cases involving statutory interpretation, "must be the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979). We find that the text of § 902 does not resolve whether "accumulated profits" are to be calculated in accordance with foreign or domestic tax concepts.

It is true, as the Court of Appeals emphasized, that §§ 902 (a)(1) and 902(c)(1)(A) link "accumulated profits" to the foreign tax imposed on the subsidiary. The link is forged by describing the foreign tax as that tax imposed "on or with respect to" accumulated profits. The provisions also, how-

[4] Calculation of the indirect credit for tax years beginning after 1986 is governed by the amended version of § 902 established by the Tax Reform Act of 1986, 100 Stat. 2528, 26 U. S. C. § 902 (1982 ed., Supp. V). The amended version substantially overhauls the method of calculating the credit and removes the controversy regarding the definition of "accumulated profits." The current version of § 902(c)(1) replaces "accumulated profits" with "undistributed earnings," which are defined as the "earnings and profits of the foreign corporation (computed in accordance with sections 964 and 986)." Section 964(a) in turn provides that "the earnings and profits of any foreign corporation . . . shall be determined according to rules substantially similar to those applicable to domestic corporations." 26 U. S. C. § 964(a) (1982 ed.).

ever, link "accumulated profits" to "dividends" by describing "accumulated profits" as the pool from which the "dividends" are issued. Section 316(a), in turn, makes clear that domestic principles control whether a payment is a "dividend" subject to domestic tax. On the basis of this link, a leading treatise has concluded that "[a]ccumulated profits of the foreign corporation . . . are, in general, equated with earnings and profits of the foreign corporation and are determined in accordance with domestic law principles." B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 17.11, p. 17–44 (5th ed. 1987) ("Adoption of these principles has the virtue of correlating the denominator of the § 902 computation with the definition of dividends (the numerator), thus avoiding the possible distortions that could arise if different definitional approaches were used for the numerator and denominator of the § 902 fraction"). Because § 902 relates "accumulated profits" both to the foreign tax paid by the subsidiary, calculated in accordance with foreign law, and to the dividend issued by the subsidiary, calculated in accordance with domestic law, we are unpersuaded that the statutory language is dispositive. We must therefore look beyond the statute's language to the legislative history, purposes, and operation of the indirect tax credit.

III

A

The history of the indirect credit clearly demonstrates that the credit was intended to protect a domestic parent from double taxation of its income. Congress first established the indirect tax credit in § 240(c) of the Revenue Act of 1918, 40 Stat. 1082, permitting a domestic parent to receive a credit for a portion of the foreign taxes paid by its subsidiary during the year in which the subsidiary issued a dividend to the parent. This Court subsequently described the purpose of § 240 (c) as protection against double taxation. *American Chicle*

Co. v. *United States*, 316 U. S. 450, 452 (1942); see also Bittker & Eustice, *supra*, at ¶17.11, p. 17–40.

The legislative history of the indirect credit also clearly reflects an intent to equalize treatment between domestic corporations that operate through foreign subsidiaries and those that operate through unincorporated foreign branches. In §238(e) of the Revenue Act of 1921, 42 Stat. 259, Congress amended §240(c) to permit a domestic corporation to claim credit for taxes its subsidiary paid in years other than those in which the dividend was issued. Prior to the amendment, a domestic corporation could not receive credit for foreign taxes paid on distributed income if its subsidiary issued the dividend out of income earned in prior years, see 316 U. S., at 453, because §240(c) limited the credit to taxes paid by the subsidiary "during the taxable year" in which the dividend was issued. The amendment corrected this deficiency by relating the credit to the accumulated profits out of which the dividends were paid.

In defending the amended version of the indirect credit, one sponsor described the purpose of the credit as securing, for domestic corporations that receive income in the form of dividends from foreign subsidiaries, the same sort of deduction available to domestic corporations that receive income from foreign branches. 61 Cong. Rec. 7184 (1921).[5] This goal of equalized treatment is reflected as well in testimony regarding the amendment before the Senate Committee on Finance, in which a spokesperson for the Department of the Treasury described the proposal as intended "to give this American corporation about the same credit as if conducting

[5] Senator Smoot stated:

"[A] foreign subsidiary is much like a foreign branch of an American corporation. If the American corporation owned a foreign branch, it would include the earnings or profits of such branch in its total income, but it would also be entitled to deduct from the tax based upon such income any income or profits taxes paid to foreign countries by the branch in question. Without special legislation, however, no credit can be obtained where the branch is incorporated under foreign laws."

a branch." Hearings on H. R. 8245 before the Senate Committee on Finance, 67th Cong., 1st Sess., pt. 2, p. 389 (1921). More recently, the Senate Report on the 1962 amendments to the indirect credit confirms Congress' intent to treat foreign branches and foreign subsidiaries alike in terms of the tax credits they generate for their domestic companies. See S. Rep. No. 1881, 87th Cong., 2d Sess., 66–67 (1962).[6]

B

Given these purposes, we now turn to the operation of the indirect tax credit. Goodyear contends that the failure to calculate accumulated profits in terms of foreign law subjects domestic corporations that receive dividends from their foreign subsidiaries to double taxation. This undesirable result occurs, in Goodyear's view, because calculation of accumulated profits in accordance with domestic principles may disconnect the relationship in § 902's formula between accumulated profits and the foreign tax paid by the subsidiary. A subsidiary incurs foreign tax liability in proportion to its foreign defined income. To recover foreign taxes paid by its subsidiary, a domestic parent's dividend must be allocated or

[6] The 1962 amendment addresses a tax preference that results if a domestic parent is credited with foreign taxes paid on subsidiary income that is used to satisfy the subsidiary's foreign tax obligations. In such a circumstance, the parent receives credit for taxes paid on undistributed income. This Court sought to eliminate this tax advantage in *American Chicle Co.* v. *United States*, 316 U. S. 450, 452 (1942), by including in the § 902 credit only those taxes paid on a subsidiary's after-tax income. The 1962 amendment addressed the problem differently, permitting a domestic parent to include all foreign taxes paid in its § 902 calculation but also requiring the parent to treat such taxes as a deemed dividend from its subsidiary. The amendment thus requires domestic parents to "gross up" the dividend income they receive by the amount of the foreign taxes attributable to such income. See S. Rep. No. 1881, 87th Cong., 2d Sess., 69 (1962). The Senate Report, describing the purpose of the amendment as removing an "unjustified tax advantage" for domestic parents, illustrates how foreign subsidiaries and foreign branches are treated unequally absent the "grossing up" requirement, even under the *American Chicle* rule. S. Rep. No. 1881, *supra*, at 66–67.

sourced to years in which its subsidiary paid foreign tax. If, however, accumulated profits are defined in domestic terms, the dividends of a domestic parent may be allocated to years in which the subsidiary paid little or no tax. In such a scenario, the parent may not be credited with foreign taxes paid by its subsidiary. To avoid this mismatching of accumulated profits and foreign tax, Goodyear contends that accumulated profits should be determined in accordance with the same principles that govern the imposition of the tax: those found in foreign law.

The Government contests Goodyear's characterization of this case as one of "double taxation." In the Government's view, the dividends received by Goodyear should not be allocated to prior years because to do so would permit Goodyear to avoid taxation altogether on domestically defined income that its subsidiary earned in 1970 and 1971. Under domestic rules, Goodyear G. B. earned sufficient income in 1970 and 1971 to cover the dividends it issued to Goodyear in those years. That British taxing authorities recognized little income in those years should not, in the Government's view, prevent the United States from recognizing the substantial income attributable to those years under domestic rules. According to the Government, the foreign tax paid in 1968 and 1969 by Goodyear G. B.—the years to which Goodyear seeks to source its dividends—relates to income that Goodyear G. B. chose not to distribute during those years as dividends to Goodyear. To credit Goodyear with taxes paid on undistributed income, the Government concludes, would be inequitable because it would provide domestic parents that operate through foreign subsidiaries favorable treatment vis-à-vis domestic corporations that use foreign branches.

Goodyear attempts to avoid the force of the Government's analysis by exploring hypothetical situations in which the calculation of accumulated profits in accordance with domestic rules presents a more plausible claim of double taxation than does this case. For example, if a subsidiary earns an equal

amount of income under foreign and domestic rules, but those rules regard the income as being earned in different years, the domestic parent would be credited with a lower portion of the tax paid by the subsidiary if domestic timing rules govern. This result appears anomalous because the same credit should be available where foreign and domestic tax principles recognize equal amounts of income and the amount of tax paid remains constant. The effect of the divergence in foreign and domestic tax principles is particularly clear when a subsidiary pays a substantial foreign tax in a given year and the amount of income recognized under domestic rules in that year is zero. In such a circumstance, *none* of the tax paid by the subsidiary can be credited to the parent because a dividend cannot be sourced to a year in which there are no accumulated profits.

Goodyear's hypotheticals persuade us that if accumulated profits are calculated according to domestic tax principles, situations can arise in which § 902's statutory goal of avoiding double taxation will be disserved. Equally persuasive, however, is the Government's claim that defining accumulated profits in terms of foreign tax principles can unfairly advantage domestic parents that operate through foreign subsidiaries over companies operating through unincorporated branches. Thus, no definitional approach to "accumulated profits" uniformly and unqualifiedly satisfies the dual purposes underlying the indirect credit.

C

We nonetheless believe that the Government's interpretation of "accumulated profits" is more faithful to congressional intent. Our view is informed first and most significantly by our assessment that the risk of double taxation outlined by Goodyear is less substantial than the risk of unequal treatment cited by the Government. Defining "accumulated profits" in accordance with domestic tax concepts results in double taxation only when a dividend is sourced to a year in

which domestic tax concepts recognize little or no income and yet a subsidiary pays substantial foreign tax. Goodyear offers no basis for the suggestion that such mismatching commonly occurs.

Goodyear's approach, on the other hand, leads to unequal tax treatment of subsidiaries and branches whenever the foreign taxing authority calculates income more or less generously than the United States. A domestic corporation must pay tax on all income of a foreign branch that is recognized under domestic law. Under Goodyear's interpretation, a domestic corporation may in some cases receive credit for taxes paid on income that, under domestic rules, the parent never received. This result is difficult to square with the express congressional purpose of ensuring tax parity between domestic corporations that operate through foreign subsidiaries and those that operate through foreign branches.

The Government's approach is also supported by administrative interpretations of § 902. In defining the credits available against foreign tax under the predecessor to § 902, the Commissioner stated that "[i]t is important in establishing the amount of the accumulated profits that it be based as a fundamental principle upon all income of the foreign corporation available for distribution to its shareholders *whether such profits be taxable by the foreign country or not.*" I. T. 2676, XII-1 Cum. Bull. 48, 50 (1933) (emphasis added). The Commissioner's approach requires a domestic assessment of income for the purposes of calculating accumulated profits. The Commissioner's position is reflected as well in a formal regulation promulgated by the Treasury in 1965, Treas. Reg. § 1.902–3(c)(1), 26 CFR § 1.902–3(c)(1) (1972), which defines "accumulated profits" under § 902(a)(1) as "the sum of [t]he earnings and profits of [the foreign subsidiary] for such year, and [t]he foreign income taxes imposed on or with respect to the gains, profits, and income to which such earnings and profits are attributable." Defining a subsidiary's "accumulated profits" as its "earnings and profits" reflects an intent

to calculate accumulated profits according to domestic principles, because "earnings and profits" in this context is a domestic tax concept.

Lastly, we find support for the Government's position in the statutory canon adopted in *Biddle* v. *Commissioner*, 302 U. S. 573, 578 (1938), that tax provisions should generally be read to incorporate domestic tax concepts absent a clear congressional expression that foreign concepts control. This canon has particularly strong application here where a contrary interpretation would leave an important statutory goal regarding equal tax treatment of foreign subsidiaries and foreign branches to the varying tax policies of foreign tax authorities.

IV

"Accumulated profits," as that term appears in § 902's indirect tax credit, should be calculated in accordance with domestic tax principles. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–1083. Argued October 2, 1989—Decided December 11, 1989

In connection with a 1978 periodic audit, respondent defense contractor and petitioner Defense Contract Audit Agency (DCAA) corresponded concerning respondent's accounting treatment of certain costs. Eight years later, a federal grand jury investigating possible fraudulent practices by respondent issued a subpoena requesting respondent's documents relating to the 1978 cost allocation question. Respondent submitted to the DCAA a Freedom of Information Act (FOIA) request for any documents relating to the subject matter of their correspondence. The DCAA denied the request citing, *inter alia*, Exemption 7(A) of the FOIA, which exempts from disclosure "records or information compiled for law enforcement purposes" under certain circumstances. Two days later the requested records were transferred to petitioner Federal Bureau of Investigation, which denied respondent's renewed FOIA request, citing Exemption 7(A). Respondent sought review in the District Court, which ruled that petitioners were not required to turn over any of the documents and dismissed the complaint, stating that disclosure would jeopardize the grand jury proceeding. The Court of Appeals reversed, ruling that the Government may not invoke Exemption 7 to protect from disclosure materials that were not investigatory records when originally collected but have since acquired investigative significance.

Held: Exemption 7 may be invoked to prevent the disclosure of documents not originally created for, but later gathered for, law enforcement purposes. The plain words of the statute contain no requirement that compilation be effected at a specific time, but merely require that the objects sought be compiled when the Government invokes the Exemption. The Court of Appeals erred in interpreting the word "compile" to mean "originally compiled," since "compiled" naturally refers to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. This reading of the statute recognizes the balance struck by Congress between the public's interest in greater access to information and the Government's need to protect certain kinds of information from disclosure and is supported by the FOIA's legislative history. Pp. 153–158.

850 F. 2d 105, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, O'CONNOR, and KENNEDY, JJ., joined. BLACKMUN, J., also filed a separate statement, *post*, p. 158. BRENNAN, J., filed a concurring opinion, *post*, p. 158. STEVENS, J., filed a dissenting opinion, *post*, p. 159. SCALIA, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 160.

Edwin S. Kneedler argued the cause for petitioners. On the briefs were *Solicitor General Starr*, *Acting Solicitor General Bryson*, *Assistant Attorney General Bolton*, *Deputy Solicitor General Wallace*, *Roy T. Englert, Jr.*, *Leonard Schaitman*, and *John C. Hoyle*.

Milton Eisenberg argued the cause for respondent. With him on the brief were *Arthur Lazarus, Jr.*, and *John T. Boese*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

Once again, we are faced with an issue under the Freedom of Information Act (FOIA or Act), 5 U. S. C. § 552. This time, we are concerned with the Act's Exemption 7, § 552 (b)(7). That provision exempts from disclosure

> "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency con-

**Patti A. Goldman* and *David C. Vladeck* filed a brief for Public Citizen et al. as *amici curiae* urging affirmance.

> ducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . ."

Our focus is on the Exemption's threshold requirement that the materials be "records or information compiled for law enforcement purposes."

I

Respondent John Doe Corporation (Corporation) is a defense contractor. As such, it is subject to periodic audits by the Defense Contract Audit Agency (DCAA), the accounting branch of the Department of Defense.[1] See 32 CFR §§ 357.2 and 357.4 (1988). In 1978, in connection with an audit, an exchange of correspondence took place between the DCAA and the Corporation concerning the proper accounting treatment of certain costs. The Government auditor, by letter dated May 2 of that year, claimed that the costs should have been charged to identifiable programs instead of to a technical overhead account. About $4.7 million in 1977 costs were discussed. The Corporation, by letter dated July 11, 1978, replied and defended its allocation. App. 22–28. No

[1] All the names in the caption of this case—"John Doe Agency" and "John Doe Government Agency," petitioners, and "John Doe Corporation," respondent, are pseudonyms. John Doe Agency, however, is the DCAA, and John Doe Government Agency is the Federal Bureau of Investigation. John Doe Corporation is a private corporation; it tells us, Brief for Respondent 1, n. 1, that its identity is revealed in materials filed under seal with the Court of Appeals.

The Solicitor General's office states, Brief for Petitioners ii; Tr. of Oral Arg. 26, that the Government has no objection to public disclosure of petitioners' names. Accordingly, in this opinion we use the real name of each "Agency." We adhere, however, to the use of respondent's pseudonym.

further action regarding the allocation of those costs was taken by the DCAA or the Corporation during the next eight years.

In 1985, the office of the United States Attorney for the Eastern District of New York instituted an investigation into possible fraudulent practices by the Corporation. A subpoena was issued to the Corporation by a grand jury on February 21, 1986. It requested documents relating to the cost allocation question which was the subject of the 1978 correspondence. On September 30, 1986, the Corporation submitted to the DCAA a request under the FOIA for any documents "that are related in any way to the subject matter" of the 1978 correspondence. *Id.*, at 19. Upon the advice of an Assistant United States Attorney, the DCAA denied the request on November 18, citing Exemptions 7(A) and (E) of the Act. App. 29. Two days later the requested records were transferred to the Federal Bureau of Investigation (FBI). *Id.*, at 92.

On February 3, 1987, the Corporation renewed its FOIA request but this time directed it to the FBI. *Id.*, at 46. That agency denied the request, citing only Exemption 7(A). *Id.*, at 49.

After exhausting its administrative remedies, the Corporation instituted the present litigation, seeking review of the withholding of the requested documents, in the United States District Court for the Eastern District of New York. *Id.*, at 6, 11. In due course, the Corporation moved to compel the preparation of a "*Vaughn* Index."[2]

The Government opposed disclosure, the preparation of the Index, and answers to propounded interrogatories on the

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[2] "*Vaughn* Index" is a term derived from *Vaughn* v. *Rosen*, 157 U. S. App. D. C. 340, 484 F. 2d 820 (1973), cert. denied, 415 U. S. 977 (1974). The "Index" usually consists of a detailed affidavit, the purpose of which is to "permit the court system effectively and efficiently to evaluate the factual nature of disputed information." 157 U. S. App. D. C., at 346, 484 F. 2d, at 826.

ground that compliance with any of these would interfere with the grand jury proceeding and would provide the Corporation with information that might be useful to it in connection with anticipated criminal litigation. The District Court ordered the Government to prepare a *Vaughn* Index and to answer the interrogatories. It ordered *sua sponte*, however, that this material be submitted to the court for examination *in camera* rather than be given directly to the Corporation. *Id.*, at 62, 66.

After conducting its examination without a hearing, the District Court ruled that petitioners were not required to turn over any of the contested documents to the Corporation. It then dismissed the complaint, stating: "[W]e are satisfied that there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [the] interrogatories, would jeopardize the grand jury proceeding." App. to Pet. for Cert. 13a–14a.

The Corporation appealed to the United States Court of Appeals for the Second Circuit. That court reversed and remanded the case. 850 F. 2d 105, 110 (1988). It ruled that the law enforcement Exemption 7, upon which the District Court implicitly relied, did not protect the records from disclosure because they were not "compiled for law enforcement purposes." *Id.*, at 109. It observed that the records "were compiled in 1978, seven years before the investigation began in 1985," *id.*, at 108, and that the 1974 amendments to the Act "make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance." *Id.*, at 109. The Court of Appeals acknowledged that compliance with the FOIA may compel disclosure of materials that ordinarily are beyond the scope of discovery in a criminal investigation, and thus may enable a potential defendant to prepare a response and construct a defense to a criminal charge. The court concluded, however, that this concern was more properly ad-

dressed to Congress.[3] *Ibid.* The court ruled, nonetheless, that on remand the Government was to be allowed to bring to the District Court's attention "any particular matter that would, if disclosed, expose some secret aspect of the grand jury's investigation." *Id.*, at 110.

The court refused to stay its mandate; it was issued on November 28, 1988. App. to Pet. for Cert. 15a. On remand, the District Court concluded that the Second Circuit's opinion required that the *Vaughn* Index be turned over to the Corporation. App. 86. The Court of Appeals on January 10, 1989, refused to stay the District Court's order requiring the furnishing of the Index, *id.*, at 96, but later that same day the Circuit Justice entered a temporary stay pending a response from the Corporation. On January 30, the Circuit Justice granted a full stay. See 488 U. S. 1306 (MARSHALL, J., in chambers).

Because of the importance and sensitivity of the issue and because of differing interpretations of the pertinent language of Exemption 7,[4] we granted certiorari. 489 U. S. 1009 (1989).

II

This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA* v. *Mink*, 410

[3] As to this conclusion, see also *North* v. *Walsh*, 279 U. S. App. D. C. 373, 382, 881 F. 2d 1088, 1097 (1989).

[4] See *New England Medical Center Hospital* v. *NLRB*, 548 F. 2d 377, 386 (CA1 1976); *Gould Inc.* v. *General Services Administration*, 688 F. Supp. 689, 699 (DC 1988); *Hatcher* v. *United States Postal Service*, 556 F. Supp. 331 (DC 1982); *Fedders Corp.* v. *FTC*, 494 F. Supp. 325, 328 (SDNY), aff'd, 646 F. 2d 560 (CA2 1980); *Gregory* v. *FDIC*, 470 F. Supp. 1329, 1333–1334 (DC 1979). See also *Crowell & Moring* v. *Department of Defense*, 703 F. Supp. 1004, 1009 (DC 1989).

U. S. 73, 80 (1973). The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of Air Force* v. *Rose*, 425 U. S. 352, 360–361 (1976), quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 242 (1978). See also *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U. S. 749, 772–773 (1989). There are, to be sure, specific exemptions from disclosure set forth in the Act. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U. S., at 361. Accordingly, these exemptions "must be narrowly construed." *Ibid.* Furthermore, "the burden is on the agency to sustain its action." 5 U. S. C. § 552(a)(4)(B).

Despite these pronouncements of liberal congressional purpose, this Court has recognized that the statutory exemptions are intended to have meaningful reach and application. On more than one occasion, the Court has upheld the Government's invocation of FOIA exemptions. See *EPA* v. *Mink*, *supra*; *Robbins Tire*, *supra*; *Reporters Committee*, *supra*; *FBI* v. *Abramson*, 456 U. S. 615 (1982). In the case last cited, the Court observed: "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," and therefore provided the "specific exemptions under which disclosure could be refused." *Id.*, at 621. Recognizing past abuses, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 6 (1966). See also *EPA* v. *Mink*, 410

U. S., at 80. The Act's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the "balance" Congress has struck.

III

We have noted above that our focus here is on § 552(b)(7)'s exemption from production of "records or information compiled for law enforcement purposes" to the extent that such production meets any one of six specified conditions or enumerated harms. Before it may invoke this provision, the Government has the burden of proving the existence of such a compilation for such a purpose. In deciding whether Exemption 7 applies, moreover, a court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery. See *Robbins Tire*, 437 U. S., at 236–239, 242; *id.*, at 243 (STEVENS, J., concurring). See also *United States* v. *Weber Aircraft Corp.*, 465 U. S. 792, 801–802 (1984). Indeed, the Court of Appeals acknowledged that this was not a principal intention of Congress. 850 F. 2d, at 108.

As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents. See Webster's Third New International Dictionary 464 (1961); Webster's Ninth New Collegiate Dictionary 268 (1983). This definition seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes. See *Gould Inc.* v. *General Services Administration*, 688 F. Supp. 689, 698 (DC 1988).

The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." See 850 F. 2d, at 109.[5] We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement. This Court itself has used the word "compile" naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI* v. *Abramson*, 456 U. S., at 622, n. 5; *Reporters Committee*, *supra*.

Respondent, too, has used the word "compile" in its ordinary sense to refer to the assembling of documents, even though those documents were put together at an earlier time

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[5] There is disagreement between the parties as to how the opinion of the Court of Appeals is to be read. Petitioners state that the Second Circuit unequivocally held that a document must originally be compiled for law enforcement purposes in order to qualify for protection under Exemption 7. Brief for Petitioners 15. Respondent disagrees and says: "The court of appeals had no occasion to rule in this case on whether records 'originally compiled' for non-law-enforcement purposes but later recompiled for law-enforcement purposes could meet the threshold requirement of Exemption 7." Brief for Respondent 13–14. Instead, argues respondent, the Court of Appeals merely held that the records in this case were never "compiled" for law enforcement, originally or subsequently, and "no other result was possible based on the facts of this case." *Id.*, at 14.

We agree with petitioners. The Court of Appeals stated:

"In the instant case, the documents requested were generated by [the DCAA] independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not 'compiled for law-enforcement purposes' and are not exempted by Subsection (b)(7)." 850 F. 2d 105, 108–109 (CA2 1988).

The court's use of the word "thus" suggests that it believed a record had to be compiled for law enforcement purposes from the outset in order to be protected by Exemption 7.

for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent asked that the requested materials be furnished as soon as they were available, and that the response to the request "not await a compilation of all the materials requested." App. 21, 47–48. This was a recognition, twice repeated, that the documents having been compiled once for the purpose of routine audits were not disqualified from being "compiled" again later for a different purpose.

We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language of Exemption 7 does not permit such a distinction. Under the statute, documents need only to have been compiled when the response to the FOIA request must be made.[6]

If, despite what we regard as the plain meaning of the statutory language, it were necessary or advisable to examine the legislative history of Exemption 7, as originally enacted and as amended in 1974, we would reach the same conclusion. JUSTICE MARSHALL, writing for the Court in *Robbins Tire*,

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[6] In the instant case, it is not clear when compilation took place. The record does disclose that the documents were transferred from the DCAA to the FBI shortly after the DCAA denied the FOIA request. The timing of the transfer, however, was not stressed by the Court of Appeals or treated by that court as dispositive. Instead, as noted above, the Court of Appeals ruled that Exemption 7 was not available because the documents were obtained originally for non-law-enforcement purposes.

While we leave to the lower courts the determination whether these documents were "compiled for law enforcement purposes" when the Government invoked Exemption 7, we do note that the pendency of the grand jury investigation serves to negate any inference that the chronology of this case raises a question about the bona fides of the Government's claim that any compilation was not made solely in order to defeat the FOIA request. See *Goldberg* v. *United States Department of State*, 260 U. S. App. D. C. 205, 211, 818 F. 2d 71, 77 (1987), cert. denied, 485 U. S. 904 (1988); *Miller* v. *United States Department of State*, 779 F. 2d 1378, 1388 (CA8 1985).

437 U. S., at 224–236, discussed this legislative history in detail. In its original 1966 form, Exemption 7 permitted nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. 89–487, § 3(e)(7), 80 Stat. 251. But the Court in *Robbins Tire* observed: "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases." 437 U. S., at 224.

To accommodate these needs, Congress in 1974 amended the Act in several respects. See *id.*, at 226–227. Concern was expressed on the Senate floor that four recent decisions in the United States Court of Appeals for the District of Columbia Circuit had permitted Exemption 7 to be applied whenever an agency could show that the document sought was an investigatory *file* compiled for law enforcement purposes.[7] Congress feared that agencies would use that rule to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for all the contents.

The aim of Congress thus was to prevent commingling. This was accomplished by two steps. The first was to change the language from investigatory "files" to investigatory "records." The second was to make the compilation requirement necessary rather than sufficient. As amended, Exemption 7 requires the Government to demonstrate that a record is "compiled for law enforcement purposes" *and* that disclosure would effectuate one or more of the six specified harms. See *Robbins Tire*, 437 U. S., at 221–222, 229–230,

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[7] The cases were *Weisberg* v. *United States Department of Justice*, 160 U. S. App. D. C. 71, 489 F. 2d 1195 (1973), cert. denied, 416 U. S. 993 (1974); *Aspin* v. *Department of Defense*, 160 U. S. App. D. C. 231, 491 F. 2d 24 (1973); *Ditlow* v. *Brinegar*, 161 U. S. App. D. C. 154, 494 F. 2d 1073 (1974); and *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 163 U. S. App. D. C. 368, 502 F. 2d 370 (1974).

235. These changes require consideration of the nature of each particular document as to which exemption was claimed. *Id.*, at 229–230. Evasional commingling thus would be prevented. The legislative history of the 1974 amendments says nothing about limiting Exemption 7 to those documents originating as law enforcement records.

A word as to *FBI* v. *Abramson*, 456 U. S. 615 (1982), is in order. There the Court was faced with the issue whether information originally compiled for law enforcement purposes lost its Exemption 7 status when it was summarized in a new document not created for law enforcement purposes. See *id.*, at 623. The Court held that such information continued to meet the threshold requirements of Exemption 7. But we do not accept the proposition, urged by respondent, that the converse of this holding—that information originally compiled for a non-law-enforcement purpose cannot become exempt under Exemption 7 when it is recompiled at a future date for law enforcement purposes—is true. See Brief for Respondent 20.

This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. See *e. g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 148–154 (1975). In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect. *Robbins Tire*, 437 U. S., at 242–243; *Abramson*, 456 U. S., at 625. See also *Department of State* v. *Washington Post Co.*, 456 U. S. 595 (1982). The statutory provision that records or information must be "compiled for law enforcement purposes" is not to be construed in a nonfunctional way.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Statement of JUSTICE BLACKMUN.

I add on my own account a word of caution. Simply because a party is a defense contractor does not mean that all doubts automatically are to be resolved against it and those in any way associated with it. A situation of the kind presented by this case can be abused, and after-the-fact acknowledgment of abuse by the Government hardly atones for the damage done by reason of the abuse. The recent *General Dynamics* case* and the sad consequences for a former National Aeronautics and Space Administration administrator whose indictment was dismissed before trial ("because the Justice Department concedes it ha[d] no case," Washington Post, June 24, 1987, p. A24, col. 1) are illustrative. Petitioners themselves, see Reply Brief for Petitioners 11, "recognize the theoretical potential for abuse." I perceive no abuse in the present case, however, that would make it resemble *General Dynamics*.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. I write separately only to note that the question presented is limited to whether materials gathered for a law enforcement purpose, but not originally created for such a purpose, are "compiled" for law enforcement purposes within the meaning of the Freedom of Information Act. The issue of *when* a document must be "compiled" in order to be exempt from disclosure under Exemption 7, see *ante*, at 153, 155, and n. 6, is not before us today. With

**General Dynamics Corp.* v. *Department of Army*, Civ. Action No. 86–522–FFF (CD Cal.), filed January 9, 1986. See Washington Post, June 23, 1987, p. A1, col. 1; N. Y. Times, June 23, 1987, p. A1, col. 3; Washington Post, June 24, 1987, p. A24, col. 1 (editorial: "It is hard to understand how this case was brought in the first place").

the understanding that we do not reach this question, I join the Court's opinion.

JUSTICE STEVENS, dissenting.

In order to justify the application of Exemption 7 of the Freedom of Information Act (FOIA), the Government has the burden of demonstrating that a request calls for "records or information compiled for law enforcement purposes." The Government can sustain that burden in either of two ways: (1) by demonstrating that the requested records and information were *originally* compiled for law enforcement purposes, or (2) by demonstrating that even though they had been generated for other purposes, they were subsequently recompiled for law enforcement purposes.

The Court states the correct standard for a "compilation," but then inexplicably fails to apply it to the facts of this case. *Ante*, at 155, n. 6. A compilation is "something composed of materials collected and assembled from various sources or other documents." *Ante*, at 153. It is not sufficient that the Government records or information "could reasonably be expected to interfere with enforcement proceedings." 5 U. S. C. §552(b)(7)(A). The Exemption is primarily designed to protect law enforcement agencies from requests for information that they have gathered for law enforcement purposes. Therefore, under the FOIA, records or information whose production would interfere with enforcement proceedings are exempt only when, by virtue of their "incorporat[ion] in a law enforcement 'mosaic,'" *Gould Inc.* v. *General Services Administration*, 688 F. Supp. 689, 698 (DC 1988), they take on law enforcement significance. In this case, the proper application of these principles is clear.

It is undisputed that the original FOIA request to the Defense Contract Audit Agency (DCAA) called for documents that had been compiled by that agency for non-law-enforcement purposes and that the documents were still in the possession of the agency at the time the request was received. Indeed, they were still in the DCAA's possession on

November 18, 1986, when the request was denied. The claim that the documents were "compiled" is supported only by a letter stating that the DCAA had been advised by the United States' Attorney's Office that the documents were exempt under the law enforcement Exemption and an averment in an affidavit of counsel that the documents were transferred to the FBI's custody on November 20, 1986, after the Government had invoked the Exemption.*

The Court has repeatedly emphasized, what is explicit in the terms of the FOIA, that "the burden is on the agency to sustain its action." 5 U. S. C. §552(a)(4)(B); see *ante*, at 152; *Department of Justice* v. *Tax Analysts*, 492 U. S. 136, 142, n. 3 (1989); *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U. S. 749, 755 (1989). The basic policy of the Act "is in favor of disclosure." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 220 (1978). As I understand the record in this case, the Government has at most established a request by a prosecutor that the requested documents be kept secret and a naked transfer of otherwise nonexempt documents from a civilian agency to the FBI. Such a transfer is not a compilation. That is what I understand to be the Court of Appeals' holding, and I am persuaded that it was entirely correct. The Government has not met its burden under the FOIA and there is no reason why it should be given a second opportunity to prove its case.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE MARSHALL joins, dissenting.

I fear today's decision confuses more law than it clarifies. From the prior opinions of this Court, I had thought that at least this much about the Freedom of Information Act was

*The Government also submitted a declaration of an Assistant United States Attorney in response to the Corporation's FOIA action. However, that declaration, which states that the requested documents were compiled by DCAA, also states incorrectly that they had been transferred to the FBI prior to the original FOIA request. App. 61.

clear: its exemptions were to be "narrowly construed." *Department of Justice* v. *Julian*, 486 U. S. 1, 8 (1988); *FBI* v. *Abramson*, 456 U. S. 615, 630 (1982); *Department of Air Force* v. *Rose*, 425 U. S. 352, 361 (1976); cf. *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U. S. 749, 773 (1989) (Act mandates "full agency disclosure unless information is exempted under clearly delineated statutory language" (citations and inner quotations omitted)); *Federal Open Market Committee* v. *Merrill*, 443 U. S. 340, 351–352 (1979). We use the same language again today, *ante*, at 152, but demonstrate by our holding that it is a formula to be recited rather than a principle to be followed.

Narrow construction of an exemption means, if anything, construing ambiguous language of the exemption in such fashion that the exemption does not apply. The word "compiled" is ambiguous—not, as the Court suggests (and readily dismisses), because one does not know whether it means "originally compiled" or "ever compiled," see *ante*, at 154–155. Rather, it is ambiguous because "compiled" does not always refer simply to "the process of gathering," or "the assembling," *ante*, at 154, but often has the connotation of a more creative activity. When we say that a statesman has "compiled an enviable record of achievement," or that a baseball pitcher has "compiled a 1.87 earned run average," we do not mean that those individuals have pulled together papers that show those results, but rather that they have *generated* or *produced* those results. Thus, Roget's Thesaurus of Synonyms and Antonyms includes "compile" in the following listing of synonyms: "compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw; set up *(printing);* enter into the composition of etc. *(be a component).*" Roget's Thesaurus 13 (S. Roget rev. 1972).

If used in this more generative sense, the phrase "records or information compiled for law enforcement purposes" would mean material that the Government has acquired or produced for those purposes—and not material acquired or produced

for other reasons, which it later shuffles into a law enforcement file. The former meaning is not only entirely possible; several considerations suggest that it is the preferable one. First of all, the word "record" (unlike the word "file," which used to be the subject of this provision, see Freedom of Information Act Amendments of 1974, Pub. L. 93–502, § 2(b), 88 Stat. 1563–1564) can refer to a single document containing a single item of information. There is no apparent reason to deprive such an item of Exemption 7 protection simply because at the time of the request it happens to be the only item in the file. It is unnatural, however, to refer to a single item as having been "compiled" in the Court's sense of "assembled" or "gathered"—though quite natural to refer to it as having been "compiled" in the generative or acquisitive sense I have described.

Secondly, the regime that the Court's interpretation establishes lends itself to abuse so readily that it is unlikely to have been intended. The only other documents I am aware of that can go from being available under FOIA to being unavailable, simply on the basis of an agency's own action, are records containing national defense or foreign policy information. Exemption 1 is inapplicable to records of that description that have not been classified, but it can be rendered applicable, even after the FOIA request has been filed, by the mere act of classification. See, *e. g.*, *Goldberg* v. *United States Department of State*, 260 U. S. App. D. C. 205, 211, 818 F. 2d 71, 77 (1987), cert. denied, 485 U. S. 904 (1988). In that context, however, Congress has greatly reduced the possibility of abuse by providing that the classification must *be proper under criteria established by Executive order.* There is no such check upon sweeping requested material into a "law enforcement" file—which term may include, I might note, not just criminal enforcement but civil and regulatory enforcement as well. See, *e. g.*, *Pope* v. *United States*, 599 F. 2d 1383, 1386 (CA5 1979). I suppose a court could disregard such a "compilation" that has been made in

bad faith, but it is hard to imagine what bad faith could consist of in this context, given the loose standard of need that will justify opening an investigation, and the loose standard of relevance that will justify including material in the investigatory file. Compare *Pratt* v. *Webster*, 218 U. S. App. D. C. 17, 29–30, 673 F. 2d 408, 420–421 (1982) (FBI acts for "'law enforcement purpose[s]'" when its investigation concerns "a possible security risk or violation of federal law" and has "at least 'a colorable claim' of its rationality"), with *Williams* v. *FBI*, 730 F. 2d 882, 883 (CA2 1984) (FBI's investigatory records are exempt from disclosure "whether or not the reviewing judicial tribunal believes there was a sound law enforcement basis for the particular investigation"); cf. *United States* v. *Bisceglia*, 420 U. S. 141, 148–151 (1975) (IRS investigative authority includes power to subpoena bank records even in the absence of suspicion that a particular taxpayer has broken the law); *Blair* v. *United States*, 250 U. S. 273, 282 (1919) (grand jury subpoena cannot be resisted by raising "questions of propriety or forecasts of the probable result of the investigation, or . . . doubts whether any particular individual will be found properly subject to an accusation of crime"). It is particularly implausible that Congress was creating this potential for abuse in its revision of Exemption 7 at the same time that it was adding the "properly classified" requirement to Exemption 1 in order to eliminate the potential for similar abuse created by our decision in *EPA* v. *Mink*, 410 U. S. 73 (1973). The Court's only response is that "[e]vasional commingling . . . would be prevented" by the requirement that a document cannot be withheld under Exemption 7 unless, if disclosed, it "would effectuate one or more of the six specified harms." *Ante*, at 156–157. But that begs the question. Congress did not extend protection to *all* documents that produced one of the six specified harms, but only to such documents "compiled for law enforcement purposes." The latter requirement is readily evaded (or illusory) if it requires nothing more than gathering up documents the Gov-

ernment does not wish to disclose, with a plausible law enforcement purpose in mind. That is a hole one can drive a truck through.

But even if the meaning of "compiled" I suggest is not necessarily the preferable one, it is unquestionably a reasonable one; and that creates an ambiguity; and our doctrine of "narrowly construing" FOIA exemptions requires that ambiguity to be resolved in favor of disclosure. The Court asserts that we have "consistently . . . taken a practical approach" to the interpretation of FOIA, by which it means achieving "a workable balance between the interests of the public . . . and the needs of the Government." *Ante*, at 157. It seems to me, however, that what constitutes a workable balance is Congress' decision and not ours; and that the *un*ambiguous provisions of FOIA are so remote from establishing what most people would consider a *reasonable* "workable balance" that there is no cause to believe such a standard permeates the Act. Consider, for example, FOIA's disequilibrous disposition with regard to information that "could reasonably be expected to endanger the life or physical safety of any individual"—namely, that such information is not withholdable in *all* cases, but only if it has been "compiled for law enforcement purposes." See 5 U. S. C. § 552(b)(7)(F). "Workable balance" is not a workable criterion in the interpretation of this law. In my view, a "practical approach" to FOIA consists of following the clear provisions of its text, and adhering to the rules we have enunciated regarding interpretation of the unclear ones—thereby reducing the volume of litigation, and making it inescapably clear to Congress what changes need to be made. I find today's decision most impractical, because it leaves the lower courts to guess whether they must follow what we say (exemptions are to be "narrowly construed") or what we do (exemptions are to be construed to produce a "workable balance").

I respectfully dissent.

HOFFMANN-LA ROCHE INC. *v.* SPERLING ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–1203. Argued October 2, 1989—Decided December 11, 1989

After petitioner employer ordered a reduction in force and discharged or demoted some 1,200 workers, respondent affected employees filed in the District Court a collective action seeking relief under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.* In order to meet the requirement of 29 U. S. C. § 216(b)—a provision of the Fair Labor Standards Act of 1938 (FLSA) incorporated in the ADEA by 29 U. S. C. § 626(b)—that an individual may become a party plaintiff in a collective action only if he files with the court his "consent in writing," respondents moved for discovery of the names and addresses of similarly situated employees and requested that the court send notice to all potential plaintiffs who had not yet filed consents. The court held that it could facilitate notice of an ADEA suit to absent class members in appropriate cases so long as the court avoided communicating any encouragement to join the suit or any approval of the suit on its merits. Thus it, *inter alia*, ordered petitioner to comply with the request for the names and addresses of discharged employees and authorized respondents to send to all employees who had not yet joined the suit a court-approved consent document and a notice stating that it had been authorized by the District Court but that the court had taken no position on the merits of the case. The Court of Appeals affirmed, ruling that there was no legal impediment to court-authorized notice in an appropriate case. It declined to review the notice's form and contents, including the District Court's authorization statement.

Held: District courts have discretion, in appropriate cases, to implement § 216(b), as incorporated by § 626(b), in ADEA actions by facilitating notice to potential plaintiffs. However, as did the Court of Appeals, this Court declines to examine the terms of the notice used here. Pp. 169–174.

(a) The District Court was correct to permit discovery of the discharged employees' names and addresses, since such discovery was relevant to the subject matter of the action, and since there were no grounds to limit discovery under the facts and circumstances of this case. P. 170.

(b) Once an ADEA suit is filed, a district court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient way and has the discretion to begin its involvement at the point of the initial notice rather than at a

later time. Court-authorized notice may counter the potential for misuse of the class device, avoids a multiplicity of duplicative suits, and sets reasonable cutoff dates to expedite the action's disposition. Moreover, by monitoring preparation and distribution of the notice, a court can ensure that the notice is timely, accurate, and informative, and can settle disputes about the notice's content before it is distributed. Federal Rules of Civil Procedure 83—which endorses measures to regulate the actions of the parties to a multiparty suit—and 16(b)—which requires the entry of scheduling orders limiting the time for, *inter alia*, the joinder of additional parties—provide further support for the trial court's authority. Petitioner's contention that court involvement in the notice process would thwart Congress' intention to relieve employers from the burden of multiparty actions, as expressed in the FLSA's 1947 amendments, is rejected, since those amendments merely limited private FLSA plaintiffs to employees who asserted their own rights, thus abolishing the right to sue of representatives with no personal interest in a suit's outcome, and left intact the "similarly situated" language providing for collective actions. Pp. 170–173.

(c) This Court's decision does not imply that trial courts have unbridled discretion in managing ADEA actions. In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality by avoiding even the appearance of judicial endorsement of the merits of the action. P. 174.

862 F. 2d 439, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 174.

John A. Ridley argued the cause for petitioner. With him on the briefs were *Richard S. Zackin* and *Harold F. Boardman, Jr.*

Leonard N. Flamm argued the cause for respondents. With him on the brief was *Ben H. Becker.**

**Robert E. Williams, Douglas S. McDowell*, and *Katrina Grider* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Opportunity Commission by *Solicitor General Starr, Deputy Solicitor General Shapiro, Stephen L. Nightingale, Charles A. Shanor, Gwendolyn Young Reams, Vella M. Fink*, and *Gale Barron Black*; and for

JUSTICE KENNEDY delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1982 ed. and Supp. V), provides that an employee may bring an action on behalf of himself and other employees similarly situated. To resolve disagreement among the Courts of Appeals,[1] we granted certiorari on the question whether a district court conducting a suit of this type may authorize and facilitate notice of the pending action. 489 U. S. 1077 (1989).

I

Age discrimination in employment is forbidden by § 4 of the ADEA. 29 U. S. C. § 623 (1982 ed. and Supp. V). Section 7(b) of the ADEA incorporates enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* (1982 ed. and Supp. V), and provides that the ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA. This controversy centers around one of the provisions the ADEA incorporates, which states, in pertinent part, that an action

> "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or

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the American Association of Retired Persons by *Christopher G. Mackaronis* and *Cathy Ventrell-Monsees.*

[1] Compare *Braunstein* v. *Eastern Photographic Laboratories, Inc.*, 600 F. 2d 335, 336 (CA2 1978) *(per curiam)* (under Fair Labor Standards Act, notice permitted because of remedial nature of FLSA and because notice would avoid a multiplicity of suits), cert. denied, 441 U. S. 944 (1979); *Woods* v. *New York Life Ins. Co.*, 686 F. 2d 578, 580–581 (CA7 1982) (allowing court-approved notice); and *United States* v. *Cook*, 795 F. 2d 987, 993 (CA Fed. 1986), with *McKenna* v. *Champion International Corp.*, 747 F. 2d 1211, 1213–1217 (CA8 1984) (disapproving court-authorized notice); *Dolan* v. *Project Construction Corp.*, 725 F. 2d 1263, 1267–1269 (CA10 1984); *Partlow* v. *Jewish Orphans' Home of Southern Cal., Inc.*, 645 F. 2d 757, 758–759 (CA9 1981); and *Kinney Shoe Corp.* v. *Vorhes*, 564 F. 2d 859, 864 (CA9 1977).

themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U. S. C. § 216(b) (1982 ed.).

In 1985, petitioner Hoffman-La Roche Inc. ordered a reduction in work force and discharged or demoted some 1,200 workers. Richard Sperling, a discharged employee and one of the respondents, filed an age discrimination charge with the Equal Employment Opportunity Commission for himself and all employees similarly situated. With the assistance of counsel, Sperling and some other employees formed a group known as Roche Age Discriminatees Asking Redress (R.A.D.A.R.). The group mailed a letter, on R.A.D.A.R. letterhead, to some 600 employees whom it had identified as potential members of the protected class. The letter advised that an action would be brought against petitioner under the ADEA and invited the addressees to join the suit by filling out and returning an enclosed consent form, thus fulfilling the statutory requirement of joinder by "consent in writing."

Respondents filed this ADEA action in Federal District Court and, through R.A.D.A.R.'s letters and informal contacts, received and filed with the court over 400 consents. To ensure that all potential plaintiffs would receive notice of the suit, respondents moved for discovery of the names and addresses of all similarly situated employees. They also requested that the court send notice to all potential plaintiffs who had not yet filed consents. Petitioner opposed both motions and filed a cross-motion asking the court to invalidate the consents already filed on the ground that the solicitation had been misleading. In addition, petitioner requested that the court send out a "corrective notice" to the individuals who had filed consents.

To resolve these matters the District Court ordered petitioner to produce the names and addresses of the discharged employees. The District Court held that it was "permissible

for a court to facilitate notice of an ADEA suit to absent class members in appropriate cases, so long as the court avoids communicating to absent class members any encouragement to join the suit or any approval of the suit on its merits." 118 F. R. D. 392, 402 (NJ 1988). The court also authorized respondents to send to all employees who had not yet joined the suit a notice and a consent document, with a text and form approved by the court. The court attached the authorized notice to its interlocutory order. At the end of the approved notice was a statement that the notice had been authorized by the District Court, but that the court had taken no position on the merits of the case. *Id.*, at 417. Finally, the District Court refused to invalidate the consents already filed.

The District Court found that its orders regarding discovery and further notice met the requirements for immediate appeal, 28 U. S. C. § 1292(b) (1982 ed., Supp. V), and the Court of Appeals permitted an appeal from that portion of the ruling. The Court of Appeals affirmed the discovery order and the order for further notice, ruling that "there is no legal impediment to court-authorized notice in an appropriate case." 862 F. 2d 439, 447 (CA3 1988). The Court of Appeals declined to review the form and contents of the notice to potential plaintiffs and, in particular, it declined to pass upon the concluding statement of the notice stating that it had been authorized by the District Court.

II

As it comes before us, this case presents the narrow question whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought. We hold that district courts have discretion, in appropriate cases, to implement 29 U. S. C. § 216(b) (1982 ed.), as incorporated by 29 U. S. C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs.

The facts and circumstances of this case illustrate the propriety, if not the necessity, for court intervention in the notice process. As did the Court of Appeals, we decline to examine the terms of the notice used here, or its concluding statement indicating court authorization. We confirm the existence of the trial court's discretion, not the details of its exercise.

The District Court was correct to permit discovery of the names and addresses of the discharged employees. Without pausing to explore alternative bases for the discovery, for instance that the employees might have knowledge of other discoverable matter, we find it suffices to say that the discovery was relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case.

The ADEA, through incorporation of § 216(b), expressly authorizes employees to bring collective age discrimination actions "in behalf of . . . themselves and other employees similarly situated." 29 U. S. C. § 216(b) (1982 ed.). Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate. Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 83. It follows that, once an ADEA action is filed, the court has a

managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way.

We have recognized that a trial court has a substantial interest in communications that are mailed for single actions involving multiple parties. In *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 101 (1981), we held that a District Court erred by entering an order that in effect prohibited communications between the named plaintiffs and others in a Rule 23 class action. Observing that class actions serve important goals but also present opportunities for abuse, we noted that "[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties." 452 U. S., at 100. The same justifications apply in the context of an ADEA action. Although the collective form of action is designed to serve the important function of preventing age discrimination, the potential for misuse of the class device, as by misleading communications, may be countered by court-authorized notice.[2]

Because trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute, it lies within the discretion of a district court to begin its involvement early, at the point of the initial notice, rather than at some later time. One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Calif. L. Rev. 770 (1981); Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Judicature 400 (1978). A trial court can

[2] We do not address any conflicts between court-authorized notice and communications with potential plaintiffs by counsel, see *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988), as these issues are not implicated in the case before us.

better manage a major ADEA action if it ascertains the contours of the action at the outset. The court is not limited to waiting passively for objections about the manner in which the consents were obtained. By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative. Both the parties and the court benefit from settling disputes about the content of the notice before it is distributed. This procedure may avoid the need to cancel consents obtained in an improper manner.

The instant case is illustrative. Petitioner objected to the form of the notice first sent by respondents' counsel, alleging that it was so inaccurate that any consents based on it should be found invalid by the court, and at the same time petitioner resisted discovery of the names and addresses of the discharged employees. Questions of notice, proper discovery, and the validity of consents were intertwined.

Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action. In this case, the trial court, as part of its order, set a cutoff date for the filing of consents, as it was bound to do if the action was to proceed in diligent fashion. By approving the form of notice sent, the trial court could be assured that its cutoff date was reasonable, rather than having to set a cutoff date based on a series of unauthorized communications or even gossip that might have been misleading.

In the context of the explicit statutory direction of a single ADEA action for multiple ADEA plaintiffs, the Federal Rules of Civil Procedure provide further support for the trial court's authority to facilitate notice. Under the terms of Rule 83, courts, in any case "not provided for by rule," may "regulate their practice in any manner not inconsistent with" federal or local rules. Rule 83 endorses measures to regulate the actions of the parties to a multiparty suit. See *Gulf Oil Co.*, *supra*, at 99, n. 10. This authority is well settled, as courts traditionally have exercised considerable authority

"to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962) (court had authority *sua sponte* to dismiss action for failure to prosecute). The interest of courts in managing collective actions in an orderly fashion is reinforced by Rule 16(b), requiring entry of a scheduling order limiting time for various pretrial steps such as joinder of additional parties. At pretrial conferences, courts are encouraged to address "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, [or] multiple parties . . . ." Fed. Rule Civ. Proc. 16(c)(10).

We reject petitioner's contention that court involvement in the notice process would thwart Congress' intention to relieve employers from the burden of multiparty actions, as expressed in the 1947 amendments to the FLSA. In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. See 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell). The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions. Portal-to-Portal Act of 1947, ch. 52, §§ 5(a), 6, 7, 61 Stat. 87–88. Congress left intact the "similarly situated" language providing for collective actions, such as this one. The broad remedial goal of the statute should be enforced to the full extent of its terms.

Our decision does not imply that trial courts have unbridled discretion in managing ADEA actions. Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims. In exercising the discretionary authority to oversee the notice-giving process, courts must be scrupulous to respect judicial neutrality. To that end, trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action.

The judgment of the Third Circuit is affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Court holds that in a § 216(b) action the district court can use its compulsory process to assist counsel for the plaintiff in locating nonparties to the litigation who may have similar claims, and in obtaining their consent to his prosecution of those claims. Because I know of no source of authority for such an extraordinary exercise of the federal judicial power, I dissent.

To read the Court's opinion, one would think that what is at issue here is nothing but a routine exercise in case management. We are told that the district court has a "managerial responsibility to oversee the joinder of additional parties" in § 216(b) actions, *ante*, at 171, in order to protect potential plaintiffs and avoid duplicative litigation. We are told that all concerned—plaintiffs, defendants, and the judicial system itself—benefit when the district courts abandon their "passiv[e]" stance and instead undertake "early judicial intervention" in the process of identifying people who have a cause of action and securing their consent to join the litigation. *Ante*, at 171–172. And we are told that by doing good in this fashion the district courts merely avail themselves of their "considerable authority 'to manage their own affairs so as to

achieve the orderly and expeditious disposition of cases.'" *Ante*, at 172–173 (quoting *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962)).

The difficulty with sweeping these orders under the rug of "case management" is that they were *not at all* designed to facilitate the adjudication of any claim before the court. The individuals whom the court helped notify were not, at the time of the orders, part of the case. Section 216(b) provides that "[n]o employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U. S. C. § 216(b) (1982 ed.). It is true, of course, that the orders can be regarded as managing *future* cases—assuring, to the extent the plaintiffs are willing, that such cases will not be filed in different courts and at different times. But that does not make *this* court's handling of *the case before it* any simpler or more efficient. Surely the judge's authority to "manage" cases has never before been thought to be more expansive than his authority to adjudicate them—*i. e.*, to extend to cases that have not actually been filed in his court.

The activity approved today is an extraordinary application of the federal judicial power, which is limited by Article III of the Constitution to the adjudication of cases and controversies. See, *e. g.*, *Muskrat* v. *United States*, 219 U. S. 346, 353–363 (1911); *Gordon* v. *United States*, 117 U. S. 697, 699–706 (1864); *United States* v. *Ferreira*, 13 How. 40, 48–52 (1852); *Hayburn's Case*, 2 Dall. 409, 410, n. (1792). The meaning of the "case or controversy" requirement was elucidated by Chief Justice Marshall many years ago:

> "This clause [Art. III, § 2, cl. 1] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting *only when the subject is submitted to it by a party who asserts his rights in the*

> *form prescribed by law.* It then becomes a case. . . ." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819 (1824) (emphasis added).

The claims facilitated or "managed" here had not yet been submitted to the District Court. No one doubts, of course, that Congress could give an executive agency authority to compel disclosure of prior employees' names, so that the agency might invite them to join an existing suit or provide their names to counsel. But giving a *court* authority to take action directed, not to the resolution of the dispute before it, but to the generation and management of other disputes, is, if not unconstitutional, at least so out of accord with age-old practices that surely it should not be assumed unless it has been clearly conferred. Yet one searches the Court's opinion in vain for any explicit statutory command that federal courts assume this novel role.

First, nothing in § 216(b) itself confers this power. The portion of the statute dealing with collective employee actions provides that employees may sue in a representative capacity for other similarly situated employees who have consented to the representation. The Court characterizes this as an "affirmative permission" for representative actions, from which it derives a "grant [of] the requisite procedural authority to *manage the process of joining multiple parties* . . . ." *Ante*, at 170 (emphasis added). Of course the reality of the matter is that it is not an "affirmative permission" for representative actions at all, but rather a *limitation* upon the affirmative permission for representative actions that already exists in Rule 23 of the Federal Rules of Civil Procedure. (That is to say, were it not for this provision of § 216(b) the representative action could be brought even *without* the prior consent of similarly situated employees.) But accepting the notion that it is an "affirmative permission" for representative actions, I do not see how that converts into an implied authorization for courts to undertake the unheard-of role of midwifing those actions. I have no doubt

that courts possess certain powers over the § 216(b) joinder process, most prominently the power to satisfy themselves that the employees who purportedly become parties are *in fact* similarly situated to the representative, and have *in fact* given valid consents to the litigation. That is simply part of the courts' ever-present duty to inquire into their jurisdiction over claims brought before them. But to reason from that to the existence of a more general "procedural authority to manage the process of joining multiple parties" seems to me fallacious. Nothing in § 216(b) remotely confers the extraordinary authority for a court—either directly or by lending its judicial power to the efforts of a party's counsel—to *search out* potential claimants, ensure that they are accurately informed of the litigation, and inquire whether they would like to bring their claims before the court.

The Court seeks to minimize the novelty of the authority it confers by analogizing it to the authority we have earlier acknowledged for district courts to regulate communications between class members and their representatives in Rule 23 class actions, in order to ensure that the former are kept accurately informed of the litigation. See *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 101 (1981). There is no comparison. In Rule 23 class actions, the members of a class which qualifies for certification are parties to the action and will be bound by the judgment (except for those members of a 23(b)(3) class who elect to opt out). See Fed. Rule Civ. Proc. 23(c)(3). It is not at all extraordinary for courts to supervise and regulate the participation of *existing* parties *in actions that are pending*. The Rules specifically provide, for example, that courts may, and in some instances must, notify absent class members of the pendency of the litigation. See Fed. Rule Civ. Proc. 23(c)(2) (requiring court in 23(b)(3) action to notify absent class members that they will be bound by judgment unless they opt out by a certain date); Fed. Rule Civ. Proc. 23(d) (authorizing court in 23(b)(1) or (b)(2) actions to notify class members of pendency of litigation). But what courts

may do with respect to absent parties says nothing about what they may do with respect to members of the public at large.

Nor do I agree with the Court that the Federal Rules Of Civil Procedure themselves provide the authority claimed by the District Court. To begin with, authorization from that source may be expressly foreclosed by Rule 82, which provides that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." Authority for the courts to use their power for a purpose that neither achieves nor assists the resolution of claims before them appears to violate that prohibition—and the urgings of judicial efficiency are no justification for ignoring it. Cf. *Finley* v. *United States*, 490 U. S. 545, 553, n. 6 (1989) (plaintiff in Federal Tort Claims Act action against United States may not, through impleader and joinder provisions of Rules 14 and 20, bring pendent third-party claim over which there is no independent grant of federal jurisdiction); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 370 (1978) (Rule 14's authorization of third-party claims does not affect the statutory requirement of complete diversity among parties in diversity actions). But even if the Federal Rules could expand judicial power in this fashion, nothing in their language suggests that they have done so. The Court relies upon Rule 16, which, in authorizing pretrial conferences to facilitate the disposition of cases, admonishes the court to address "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. Rule Civ. Proc. 16(c)(10). It would certainly be strange to confer an unusual new power by simply mentioning that power (as one of the subjects that can be considered) in a provision designed to authorize pretrial conferences. But in any case, the authority to "manage actions" cannot reasonably be read to refer to the management of claims and

parties not before the court. This is made entirely clear by the Rule's catchall provision, which admonishes the court to address "such *other* matters as may aid in the disposition *of the action.*" Fed. Rule Civ. Proc. 16(c)(11) (emphasis added).

The Court's repeated reliance upon Rule 83 is so strained that it snaps. Rule 83 states: "In all cases not provided for by rule, the district judges . . . may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." The contention here is that this is not a "regulation of practice" *pertinent to resolution of the controversy before the court.* To respond to that contention by pointing out that the court has been given authority to "regulate practice" is not to respond at all—unless the Court means that "regulating practice" includes impositions upon the parties and their counsel for any purpose whatever.

In addition to being void because of lack of authority to act for a purpose unrelated to adjudication of the case before it, one of the court's orders, the discovery order, was invalid because the purpose for which it was issued was not a purpose permitted by Rule 26. Rule 26(b), entitled "Discovery Scope and Limits," provides:

> "*Unless otherwise limited* by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> "(1) . . . Parties may obtain discovery regarding any matter, not privileged, *which is relevant to the subject matter involved in the pending action,* whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial *if the information sought appears reason-*

ably calculated to lead to the discovery of admissible evidence." (Emphasis added.)

The discovery order here had nothing to do with "the subject matter involved in the pending action," in the plainly intended sense of constituting, or "lead[ing] to the discovery of," admissible evidence. To the contrary, it was entered by the District Court solely to "facilitate notice of an ADEA suit to absent class members," 118 F. R. D. 392, 402 (NJ 1988), and was sustained by the Third Circuit as an exercise of "the authority of the district court in an ADEA action to facilitate joinder of the putative class members," 862 F. 2d 439, 444 (1988). Discovery for that purpose is simply not authorized. The Court notes casually that it does not "paus[e] to explore alternative bases for the discovery, for instance that the employees might have knowledge of other discoverable matter." *Ante*, at 170. I suggest that those are not "alternative bases for the discovery," but the *only* permissible bases for discovery. And the speculation that they "might" exist will not support affirmance of an order that was squarely based on another ground. Thus, to reach its disposition the Court not only bends traditionally understood case-or-controversy limitations but invents a discovery power beyond what the Rules confer.

In the end, the only serious justification for today's decision is that it makes for more efficient and economical adjudication of cases—not more efficient and economical adjudication of the *pending* case, but of *other* cases that might later be filed separately on behalf of plaintiffs who would have been perfectly willing to join the present suit instead. I concede that this justification, at least, is entirely valid. The problem is that it is a justification in policy but not in law.

If the benefits of judicial efficiency and economy constitute sufficient warrant for the District Court's action, then one can imagine numerous areas in which district courts should similarly take on the function of litigation touts—*whenever*, in fact, they have before them a claim that is similar to claims

which other identifiable individuals might possess. The Court's suggestion that ADEA suits are rendered distinctive by § 216(b)'s "explicit statutory direction of a single ADEA action for multiple ADEA plaintiffs," *ante*, at 172, is entirely unpersuasive. Section 216 no more *directs* a single action in ADEA litigation than Rule 20 (permissive joinder) *directs* a single action in all other litigation. Both provisions *permit* (in the words of Rule 20) that persons may "join in one action as plaintiffs [who] assert [a] right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Fed. Rule Civ. Proc. 20(a).

There is more than a little historical irony in the Court's decision today. "Stirring up litigation" was once exclusively the occupation of disreputable lawyers, roundly condemned by this and all American courts. See, *e. g.*, *Peck* v. *Heurich*, 167 U. S. 624, 629–630 (1897); *Grinnell* v. *Railroad Company*, 103 U. S. 739, 744 (1881). But in the age of the "case managing" judicial bureaucracy, our perceptions have changed. Seeking out and notifying sleeping potential plaintiffs yields such economies of scale that what was once demeaned as a drain on judicial resources is now praised as a cutting-edge tool of efficient judicial administration. Perhaps it is. But that does not justify our taking it in hand when Congress has not authorized it. Even less does it justify our rush to abandon (not only without compulsion but without invitation) what the Court deprecatingly calls the courts' "passive" role in determining which claims come before them, but which I regard as one of the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims.

I respectfully dissent.

UNIVERSITY OF PENNSYLVANIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–493. Argued November 7, 1989—Decided January 9, 1990

After petitioner university denied tenure to associate professor Rosalie Tung, she filed a charge with respondent Equal Employment Opportunity Commission (EEOC) alleging discrimination on the basis of race, sex, and national origin in violation of Title VII of the Civil Rights Act of 1964. In the course of its investigation, the EEOC issued a subpoena seeking, *inter alia*, Tung's tenure-review file and the tenure files of five male faculty members identified in the charge as having received more favorable treatment than Tung. Petitioner refused to produce a number of the tenure-file documents and applied to the EEOC for modification of the subpoena to exclude what it termed "confidential peer review information." The EEOC denied the application and successfully sought enforcement of the subpoena by the District Court. The Court of Appeals affirmed, rejecting petitioner's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the EEOC to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials.

Held: A university does not enjoy a special privilege requiring a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials pertinent to charges of discrimination in tenure decisions are disclosed to the EEOC. Pp. 188–202.

(a) The claimed privilege cannot be grounded in the common law under Federal Rule of Evidence 501. This Court is reluctant to recognize petitioner's asserted privilege where it appears that Congress, in expressly extending Title VII's coverage to educational institutions in 1972 and in thereafter continuing to afford the EEOC a broad right of access to any evidence "relevant" to a charge under investigation, balanced the substantial costs of invidious discrimination in institutions of higher learning against the importance of academic autonomy, but did not see fit to create a privilege for peer review documents. In fact, Congress did provide a modicum of protection for an employer's interest in the confidentiality of its records by making it a crime for EEOC employees to publicize before the institution of court proceedings materials obtained during investigations. Petitioner has not offered persuasive

justification for its claim that this Court should go further than Congress thought necessary to safeguard confidentiality. Disclosure of peer review materials will often be necessary in order for the EEOC to determine whether illegal discrimination has taken place. Moreover, the adoption of a requirement that the EEOC demonstrate a specific reason for disclosure, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the EEOC's way and give universities a weapon to frustrate investigations. It would also lead to a wave of similar privilege claims by other employers, such as writers, publishers, musicians, and lawyers, who play significant roles in furthering speech and learning in society. Furthermore, petitioner's claim is not supported by this Court's precedents recognizing qualified privileges for Presidential and grand and petit jury communications and for deliberative intra-agency documents, since a privilege for peer review materials lacks a historical, constitutional, or statutory basis similar to that of those privileges. Pp. 188–195.

(b) Nor can the claimed privilege be grounded in First Amendment "academic freedom." Petitioner's reliance on this Court's so-called academic freedom cases is somewhat misplaced, since, in invalidating various governmental actions, those cases dealt with attempts to control university speech that were *content based* and that constituted a *direct* infringement on the asserted right to determine on academic grounds who could teach. In contrast, petitioner here does not allege any content-based regulation but only that the "quality of instruction and scholarship [will] decline" as a result of the burden EEOC subpoenas place on the peer review process. The subpoena at issue does not provide criteria that petitioner *must* use in selecting teachers or prevent it from using any such criteria other than those proscribed by Title VII, and therefore respects *legitimate* academic decisionmaking. In any event, the First Amendment does not embrace petitioner's claim to the effect that the right of academic freedom derived from the cases relied on should be expanded to protect confidential peer review materials from disclosure. By comparison with cases in which the Court has recognized a First Amendment right, the complained-of infringement is extremely attenuated in that the burden of such disclosure is far removed from the asserted right, and, if petitioner's claim were accepted, many other generally applicable laws, such as tax laws, might be said to infringe the First Amendment to the extent they affected university hiring. In addition, the claimed injury to academic freedom is speculative, since confidentiality is not the norm in all peer review systems, and since some disclosure of peer evaluations would take place even if the "special necessity" test were adopted. Moreover, this Court will not assume that most evaluators will become less candid if the possibility of disclosure increases.

This case is in many respects similar to *Branzburg* v. *Hayes*, 408 U. S. 665, where, in rejecting the contention that the First Amendment prohibited requiring a reporter to testify as to information obtained in confidence without a special showing that such testimony was necessary, the Court declared that the Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of generally applicable laws, *id.*, at 682, and indicated a reluctance to recognize a constitutional privilege of uncertain effect and scope, *id.*, at 693, 703. Pp. 195–202.

850 F. 2d 969, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Rex E. Lee argued the cause for petitioner. With him on the briefs were *Steven B. Feirson*, *Carter G. Phillips*, *Mark D. Hopson*, *Nancy J. Bregstein*, *Shelley Z. Green*, and *Neil J. Hamburg*.

Solicitor General Starr argued the cause for respondent. With him on the briefs were *Acting Solicitor General Bryson*, *Deputy Solicitors General Wallace* and *Merrill*, *Stephen L. Nightingale*, *Charles A. Shanor*, *Gwendolyn Young Reams*, *Lorraine C. Davis*, and *Harry F. Tepker, Jr.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are asked to decide whether a university enjoys a special privilege, grounded in either the common law or the First Amendment, against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions.

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*Briefs of *amici curiae* urging reversal were filed for the American Association of University Professors by *William W. Van Alstyne*, *Ann H. Franke*, and *Martha A. Toll;* for the President and Fellows of Harvard College by *Allan A. Ryan, Jr.*, and *Daniel Steiner;* for Stanford University et al. by *Steven L. Mayer*, *Iris Brest*, *Susan K. Hoerger*, and *Thomas H. Wright, Jr.;* and for the American Council on Education by *Sheldon Elliot Steinbach*.

Susan Deller Ross, *R. Bruce Keiner, Jr.*, and *Sarah E. Burns* filed a brief for the NOW Legal Defense and Education Fund et al. as *amici curiae* urging affirmance.

I

The University of Pennsylvania, petitioner here, is a private institution. It currently operates 12 schools, including the Wharton School of Business, which collectively enroll approximately 18,000 full-time students.

In 1985, the University denied tenure to Rosalie Tung, an associate professor on the Wharton faculty. Tung then filed a sworn charge of discrimination with respondent Equal Employment Opportunity Commission (EEOC or Commission). App. 23. As subsequently amended, the charge alleged that Tung was the victim of discrimination on the basis of race, sex, and national origin, in violation of § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a) (1982 ed.), which makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

In her charge, Tung stated that the department chairman had sexually harassed her and that, in her belief, after she insisted that their relationship remain professional, he had submitted a negative letter to the University's Personnel Committee which possessed ultimate responsibility for tenure decisions. She also alleged that her qualifications were "equal to or better than" those of five named male faculty members who had received more favorable treatment. Tung noted that the majority of the members of her department had recommended her for tenure, and stated that she had been given no reason for the decision against her, but had discovered of her own efforts that the Personnel Committee had attempted to justify its decision "on the ground that the Wharton School is not interested in China-related research." App. 29. This explanation, Tung's charge alleged, was a pretext for discrimination: "simply their way of saying they do not want a Chinese-American, Oriental, woman in their school." *Ibid.*

The Commission undertook an investigation into Tung's charge and requested a variety of relevant information from petitioner. When the University refused to provide certain of that information, the Commission's Acting District Director issued a subpoena seeking, among other things, Tung's tenure-review file and the tenure files of the five male faculty members identified in the charge. *Id.*, at 21. Petitioner refused to produce a number of the tenure-file documents. It applied to the Commission for modification of the subpoena to exclude what it termed "confidential peer review information," specifically, (1) confidential letters written by Tung's evaluators; (2) the department chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and (4) comparable portions of the tenure-review files of the five males. The University urged the Commission to "adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process" and to resort to "all feasible methods to minimize the intrusive effects of its investigations." Exhibit 2 to EEOC's Memorandum in Support of Application for Order to Show Cause 6.

The Commission denied the University's application. It concluded that the withheld documents were needed in order to determine the merit of Tung's charges. The Commission found: "There has not been enough data supplied in order for the Commission to determine whether there is reasonable cause to believe that the allegations of sex, race and national origin discrimination is *[sic]* true." App. to Pet. for Cert. A31. The Commission rejected petitioner's contention that a letter, which set forth the Personnel Committee's reasons for denying Tung tenure, was sufficient for disposition of the charge. "The Commission would fall short of its obligation" to investigate charges of discrimination, the EEOC's order

stated, "if it stopped its investigation once [the employer] has . . . provided the reasons for its employment decisions, without verifying whether that reason is a pretext for discrimination." *Id.*, at A32. The Commission also rejected petitioner's proposed balancing test, explaining that "such an approach in the instant case . . . would impair the Commission's ability to fully investigate this charge of discrimination." *Id.*, at A33. The Commission indicated that enforcement proceedings might be necessary if a response was not forthcoming within 20 days. *Ibid.*

The University continued to withhold the tenure-review materials. The Commission then applied to the United States District Court for the Eastern District of Pennsylvania for enforcement of its subpoena. The court entered a brief enforcement order.[1] *Id.*, at A35.

The Court of Appeals for the Third Circuit affirmed the enforcement decision. 850 F. 2d 969 (1988).[2] Relying upon its earlier opinion in *EEOC* v. *Franklin and Marshall Col-*

[1] Three days before the stated 20-day period expired, petitioner brought suit against the EEOC in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and an order quashing the subpoena. App. 4. The Pennsylvania District Court declined to follow its controlling court's announced "first-filed" rule, which counsels the stay or dismissal of an action that is duplicative of a previously filed suit in another federal court. See *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929 (CA3 1941), cert. denied, 315 U. S. 813 (1942); *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F. 2d 877, 887, n. 10 (CA3 1981), cert. denied *sub nom. Compagnie des Bauxites de Guinee* v. *Insurance Corp. of Ireland, Ltd.*, 457 U. S. 1105 (1982). This declination, however, was upheld by the Third Circuit. See 850 F. 2d 969, 972 (1988). Since the applicability of the "first-filed" rule to the facts of this case is not a question on which we granted certiorari, we do not address it.

[2] The Court of Appeals did not rule on the question whether the Commission's subpoena permits petitioner to engage in any redaction of the disputed records before producing them, because the District Court had not fully considered that issue. The Third Circuit therefore ordered that the case be remanded for further consideration of possible redaction. See *id.*, at 982.

lege, 775 F. 2d 110 (1985), cert. denied, 476 U. S. 1163 (1986), the court rejected petitioner's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials. Because of what might be thought of as a conflict in approach with the Seventh Circuit's decision in *EEOC* v. *University of Notre Dame du Lac*, 715 F. 2d 331, 337 (1983), and because of the importance of the issue, we granted certiorari limited to the compelled-disclosure question. 488 U. S. 992 (1988), and amended, 490 U. S. 1015 (1989).

II

As it had done before the Commission, the District Court, and the Court of Appeals, the University raises here essentially two claims. First, it urges us to recognize a qualified common-law privilege against disclosure of confidential peer review materials. Second, it asserts a First Amendment right of "academic freedom" against wholesale disclosure of the contested documents. With respect to each of the two claims, the remedy petitioner seeks is the same: a requirement of a judicial finding of particularized necessity of access, beyond a showing of mere relevance, before peer review materials are disclosed to the Commission.

A

Petitioner's common-law privilege claim is grounded in Federal Rule of Evidence 501. This provides in relevant part:

> "Except as otherwise required by the Constitution . . . as provided by Act of Congress or in rules prescribed by the Supreme Court . . . , the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The University asks us to invoke this provision to fashion a new privilege that it claims is necessary to protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities. These institutions are special, observes petitioner, because they function as "centers of learning, innovation and discovery." Brief for Petitioner filed June 23, 1989, p. 24 (hereinafter Brief for Petitioner).

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." *Trammel* v. *United States*, 445 U. S. 40, 51 (1980). Inasmuch as "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence,'" *id.*, at 50, quoting *United States* v. *Bryan*, 339 U. S. 323, 331 (1950), any such privilege must "be strictly construed." 445 U. S., at 50.

Moreover, although Rule 501 manifests a congressional desire "not to freeze the law of privilege" but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, *id.*, at 47, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. Cf. *Branzburg* v. *Hayes*, 408 U. S. 665, 706 (1972). The balancing of conflicting interests of this type is particularly a legislative function.

With all this in mind, we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials. We begin by noting that Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents.

When Title VII was enacted originally in 1964, it exempted an "educational institution with respect to the employment of individuals to perform work connected with the educational

activities of such institution." § 702, 78 Stat. 255. Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103. This extension of Title VII was Congress' considered response to the widespread and compelling problem of invidious discrimination in educational institutions. The House Report focused specifically on discrimination in higher education, including the lack of access for women and minorities to higher ranking (*i. e.*, tenured) academic positions. See H. R. Rep. No. 92–238, pp. 19–20 (1971). Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members.[3] Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.

The effect of the elimination of this exemption was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions. This Court previously has observed that Title VII "sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 62 (1984), quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 359 (1977). The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination. The Act obligates the Commission to investigate a charge of discrimination to determine whether there is "reasonable cause to believe that the charge is true." 42 U. S. C. § 2000e–5(b) (1982 ed.). If it finds no such reasonable cause, the Commission is directed to dismiss the charge. If it does find reasonable cause, the Commission shall "endeavor to eliminate [the] alleged unlawful employ-

[3] See, *e. g.*, 118 Cong. Rec. 311 (1972) (remarks of Sen. Ervin); *id.*, at 946 (remarks of Sen. Allen); *id.*, at 4919 (remarks of Sen. Ervin).

ment practice by informal methods of conference, conciliation, and persuasion." *Ibid.* If attempts at voluntary resolution fail, the Commission may bring an action against the employer. § 2000e–5(f)(1).[4]

To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e–8(a) confers a broad right of access to relevant evidence:

> "[T]he Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [the Act] and is relevant to the charge under investigation."

If an employer refuses to provide this information voluntarily, the Act authorizes the Commission to issue a subpoena and to seek an order enforcing it. § 2000e–9 (incorporating 29 U. S. C. § 161).

On their face, §§ 2000e–8(a) and 2000e–9 do not carve out any special privilege relating to peer review materials, despite the fact that Congress undoubtedly was aware, when it extended Title VII's coverage, of the potential burden that access to such material might create. Moreover, we have noted previously that when a court is asked to enforce a Commission subpoena, its responsibility is to "satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge . . . and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." It is not then to determine "whether the charge of discrimination is 'well founded' or 'verifiable.'" *EEOC* v. *Shell Oil Co.*, 466 U. S., at 72, n. 26.

The University concedes that the information sought by the Commission in this case passes the relevance test set

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[4] Similarly, the charging party may bring an action after it obtains a "right-to-sue" letter from the Commission. § 2000e–5(f)(1).

forth in *Shell Oil*. Tr. of Oral Arg. 6. Petitioner argues, nevertheless, that Title VII affirmatively grants courts the discretion to require more than relevance in order to protect tenure review documents. Although petitioner recognizes that Title VII gives the Commission broad "power to *seek* access to all evidence that may be 'relevant to the charge under investigation,'" Brief for Petitioner 38 (emphasis added), it contends that Title VII's subpoena enforcement provisions do not give the Commission an unqualified right to *acquire* such evidence. *Id.*, at 38–41. This interpretation simply cannot be reconciled with the plain language of the text of § 2000e–8(a), which states that the Commission "*shall . . . have* access" to "relevant" evidence (emphasis added). The provision can be read only as giving the Commission a right to obtain that evidence, not a mere license to seek it.

Although the text of the access provisions thus provides no privilege, Congress did address situations in which an employer may have an interest in the confidentiality of its records. The same § 2000e–8 which gives the Commission access to any evidence relevant to its investigation also makes it "unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding" under the Act. A violation of this provision subjects the employee to criminal penalties. *Ibid.* To be sure, the protection of confidentiality that § 2000e–8(e) provides is less than complete.[5] But this, if anything, weakens petitioner's argument. Congress apparently considered the issue of confidentiality, and it provided a modicum of protection. Petitioner urges us to go further than Congress thought necessary to safeguard that value, that is, to strike the balance differently from the one Congress adopted. Petitioner, how-

[5] The prohibition on Commission disclosure does not apply, for example, to the charging party. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U. S. 590, 598–604 (1981).

ever, does not offer any persuasive justification for that suggestion.

We readily agree with petitioner that universities and colleges play significant roles in American society. Nor need we question, at this point, petitioner's assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest. Often, as even petitioner seems to admit, see Reply Brief for Petitioner 15, disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a "smoking gun" to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files. The Court of Appeals for the Third Circuit expressed it this way:

> "Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. . . . [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision." *EEOC* v. *Franklin and Marshall College*, 775 F. 2d, at 116 (emphasis deleted).

Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a "specific reason for disclosure," see Brief for Petitioner 46, beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination. Cf. *Branzburg* v. *Hayes*, 408 U. S., at 705–706. A university faced with a disclosure request might well utilize the privilege in a way that frustrates the EEOC's mission. We are reluctant to "place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." *EEOC* v. *Shell Oil Co.*, 466 U. S., at 81.

Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument. Accordingly, we stand behind the breakwater Congress has established: unless specifically provided otherwise in the statute, the EEOC may obtain "relevant" evidence. Congress has made the choice. If it dislikes the result, it of course may revise the statute.

Finally, we see nothing in our precedents that supports petitioner's claim. In *United States* v. *Nixon*, 418 U. S. 683 (1974), upon which petitioner relies, we recognized a qualified privilege for Presidential communications. It is true that in fashioning this privilege we noted the importance of confidentiality in certain contexts:

> "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Id.*, at 705.

But the privilege we recognized in *Nixon* was grounded in the separation of powers between the branches of the Federal Government. "[T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.*, at 705–706 (footnote omitted). As we discuss below, petitioner's claim of privilege lacks similar constitutional foundation.

In *Douglas Oil Co. of Cal.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979), the Court recognized the privileged nature of grand jury proceedings. We noted there that the rule of secrecy dated back to the 17th century, was imported into our federal common law, and was eventually codified in Federal Rule of Criminal Procedure 6(e) as "an integral part of our criminal justice system." 441 U. S., at 218, n. 9. Similarly, in *Clark* v. *United States*, 289 U. S. 1, 13 (1933), the Court recognized a privilege for the votes and deliberations of a petit jury, noting that references to the privilege "bear with them the implications of an immemorial tradition." More recently, in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), we construed an exception to the Freedom of Information Act in which Congress had incorporated a well-established privilege for deliberative intraagency documents. A privilege for peer review materials has no similar historical or statutory basis.

B

As noted above, petitioner characterizes its First Amendment claim as one of "academic freedom." Petitioner begins its argument by focusing our attention upon language in prior cases acknowledging the crucial role universities play in the dissemination of ideas in our society and recognizing "academic freedom" as a "special concern of the First Amendment." *Keyishian* v. *Board of Regents of University of New York*, 385 U. S. 589, 603 (1967). In that case the Court said:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." See also *Adler* v. *Board of Education of City of New York*, 342 U. S. 485, 511 (1952) (academic freedom is central to "the pursuit of truth which the First Amendment was designed to protect" (Douglas, J., dissenting)). Petitioner places special reliance on Justice Frankfurter's opinion, concurring in the result, in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957), where the Justice recognized that one of "four essential freedoms" that a university possesses under the First Amendment is the right to "determine for itself on academic grounds *who may teach*" (emphasis added).

Petitioner contends that it exercises this right of determining "on academic grounds who may teach" through the process of awarding tenure. A tenure system, asserts petitioner, determines what the university will look like over time. "In making tenure decisions, therefore, a university is doing nothing less than shaping its own identity." Brief for Petitioner 19.

Petitioner next maintains that the peer review process is the most important element in the effective operation of a tenure system. A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship, both from the candidate's peers at the university and from scholars at other institutions. These evaluations, says petitioner, traditionally have been provided with express or implied assurances of confidentiality. It is confidentiality that ensures candor and enables an institution to make its tenure decisions on the basis of valid academic criteria.

Building from these premises, petitioner claims that requiring the disclosure of peer review evaluations on a finding of mere relevance will undermine the existing process of awarding tenure, and therefore will result in a significant infringement of petitioner's First Amendment right of aca-

demic freedom. As more and more peer evaluations are disclosed to the EEOC and become public, a "chilling effect" on candid evaluations and discussions of candidates will result. And as the quality of peer review evaluations declines, tenure committees will no longer be able to rely on them. "This will work to the detriment of universities, as less qualified persons achieve tenure causing the quality of instruction and scholarship to decline." *Id.*, at 35. Compelling disclosure of materials "also will result in divisiveness and tension, placing strain on faculty relations and impairing the free interchange of ideas that is a hallmark of academic freedom." *Ibid.* The prospect of these deleterious effects on American colleges and universities, concludes petitioner, compels recognition of a First Amendment privilege.

In our view, petitioner's reliance on the so-called academic-freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it. In *Sweezy*, for example, the Court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the Court spoke of "academic freedom" and the right to determine on "academic grounds who may teach" the Court was speaking in reaction to content-based regulation. See *Sweezy* v. *New Hampshire*, 354 U. S., at 250 (plurality opinion discussing problems that result from imposition of a "strait jacket upon the intellectual leaders in our colleges and universities"); *Keyishian* v. *Board of Regents*, 385 U. S., at 603 (discussing dangers that are present when a "pall of orthodoxy" is cast "over the classroom").

Fortunately, we need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty or by other means,[6] because petitioner does not allege that the Commission's subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view. Instead, as noted above, petitioner claims that the "quality of instruction and scholarship [will] decline" as a result of the burden EEOC subpoenas place on the peer review process.

Also, the cases upon which petitioner places emphasis involved *direct* infringements on the asserted right to "determine for itself on academic grounds who may teach." In *Keyishian*, for example, government was attempting to *substitute* its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution. In contrast, the EEOC subpoena at issue here effects no such usurpation. The Commission is not providing criteria that petitioner *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those—including race, sex, and national origin—that are proscribed under Title VII.[7] In keeping with Title VII's

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[6] Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities. Such content-based regulation of private speech traditionally has carried with it a heavy burden of justification. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95, 98–99 (1972). Where, as was the situation in the academic-freedom cases, government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator. Cf. *Meese* v. *Keene*, 481 U. S. 465, 484, n. 18 (1987) (citing *Block* v. *Meese*, 253 U. S. App. D. C. 317, 327–328, 793 F. 2d 1303, 1313–1314 (1986)). See generally, M. Yudof, When Government Speaks (1983).

[7] Petitioner does not argue in this case that race, sex, and national origin constitute "academic grounds" for the purposes of its claimed First

preservation of employers' remaining freedom of choice, see *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989) (plurality opinion), courts have stressed the importance of avoiding second-guessing of legitimate academic judgments. This Court itself has cautioned that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 225 (1985). Nothing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking.

That the burden of which the University complains is neither content based nor direct does not necessarily mean that petitioner has no valid First Amendment claim. Rather, it means only that petitioner's claim does not fit neatly within any right of academic freedom that could be derived from the cases on which petitioner relies. In essence, petitioner asks us to recognize an *expanded* right of academic freedom to protect confidential peer review materials from disclosure. Although we are sensitive to the effects that content-neutral government action may have on speech, see, *e. g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981), and believe that burdens that are less than direct may sometimes pose First Amendment concerns, see, *e. g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958), we think the First Amendment cannot be extended to embrace petitioner's claim.

First, by comparison with the cases in which we have found a cognizable First Amendment claim, the infringement the University complains of is extremely attenuated. To repeat, it argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which petitioner seeks to exer-

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Amendment right to academic freedom. Cf. *Regents of University of California* v. *Bakke*, 438 U. S. 265, 312–313 (1978) (opinion of Powell, J.).

cise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right.

Indeed, if the University's attenuated claim were accepted, many other generally applicable laws might also be said to infringe the First Amendment. In effect, petitioner says no more than that disclosure of peer review materials makes it more difficult to acquire information regarding the "academic grounds" on which petitioner wishes to base its tenure decisions. But many laws make the exercise of First Amendment rights more difficult. For example, a university cannot claim a First Amendment violation simply because it may be subject to taxation or other government regulation, even though such regulation might deprive the university of revenue it needs to bid for professors who are contemplating working for other academic institutions or in industry. We doubt that the peer review process is any more essential in effectuating the right to determine "who may teach" than is the availability of money. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976) (discussing how money is sometimes necessary to effectuate First Amendment rights).

In addition to being remote and attenuated, the injury to academic freedom claimed by petitioner is also speculative. As the EEOC points out, confidentiality is not the norm in all peer review systems. See, *e. g.*, G. Bednash, The Relationship Between Access and Selectivity in Tenure Review Outcomes (1989) (unpublished Ph.D. dissertation, University of Maryland). Moreover, some disclosure of peer evaluations would take place even if petitioner's "special necessity" test were adopted. Thus, the "chilling effect" petitioner fears is at most only incrementally worsened by the absence of a privilege. Finally, we are not so ready as petitioner seems to be to assume the worst about those in the academic community. Although it is possible that some evaluators may become less candid as the possibility of disclosure increases, others may simply ground their evaluations in specific exam-

ples and illustrations in order to deflect potential claims of bias or unfairness. Not all academics will hesitate to stand up and be counted when they evaluate their peers.

The case we decide today in many respects is similar to *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). In *Branzburg*, the Court rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary. Petitioners there, like petitioner here, claimed that requiring disclosure of information collected in confidence would inhibit the free flow of information in contravention of First Amendment principles. In the course of rejecting the First Amendment argument, this Court noted that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." *Id.*, at 682. We also indicated a reluctance to recognize a constitutional privilege where it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Id.*, at 693. See also *Herbert* v. *Lando*, 441 U. S. 153, 174 (1979). We were unwilling then, as we are today, "to embark the judiciary on a long and difficult journey to . . . an uncertain destination." 408 U. S., at 703.[8]

Because we conclude that the EEOC subpoena process does not infringe any First Amendment right enjoyed by petitioner, the EEOC need not demonstrate any special justification to sustain the constitutionality of Title VII as applied to tenure peer review materials in general or to the subpoena involved in this case. Accordingly, we need not address the

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[8] In *Branzburg* we recognized that the bad-faith exercise of grand jury powers might raise First Amendment concerns. 408 U. S., at 707. The same is true of EEOC subpoena powers. See *EEOC* v. *Shell Oil Co.*, 466 U. S. 54, 72, n. 26 (1984). There is no allegation or indication of any such abuse by the Commission in this case.

Commission's alternative argument that any infringement of petitioner's First Amendment rights is permissible because of the substantial relation between the Commission's request and the overriding and compelling state interest in eradicating invidious discrimination.[9]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[9] We also do not consider the question, not passed upon by the Court of Appeals, whether the District Court's enforcement of the Commission's subpoena will allow petitioner to redact information from the contested materials before disclosing them. See n. 2, *supra*.

COMMISSIONER OF INTERNAL REVENUE *v.* INDIANAPOLIS POWER & LIGHT CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88–1319. Argued October 31, 1989—Decided January 9, 1990

Respondent Indianapolis Power & Light Co. (IPL), a regulated Indiana utility and an accrual-basis taxpayer, requires customers having suspect credit to make deposits with it to assure prompt payment of future electric bills. Prior to termination of service, customers who satisfy a credit test can obtain a refund of their deposits or can choose to have the amount applied against future bills. Although the deposits are at all times subject to the company's unfettered use and control, IPL does not treat them as income at the time of receipt but carries them on its books as current liabilities. Upon audit of IPL's returns for the tax years at issue, petitioner Commissioner of Internal Revenue asserted deficiencies, claiming that the deposits are advance payments for electricity and therefore are taxable to IPL in the year of receipt. The Tax Court ruled in favor of IPL on its petition for redetermination, holding that the deposits' principal purpose is to serve as security rather than as prepayment of income. The Court of Appeals affirmed.

Held: The customer deposits are not advance payments for electricity and therefore do not constitute taxable income to IPL upon receipt. Although IPL derives some economic benefit from the deposits, it does not have the requisite "complete dominion" over them *at the time they are made*, the crucial point for determining taxable income. IPL has an obligation to repay the deposits upon termination of service or satisfaction of the credit test. Moreover, a customer submitting a deposit makes no commitment to purchase any electricity at all. Thus, while deposits eventually may be used to pay for electricity by virtue of customer default or choice, IPL's right to retain them at the time they are made is contingent upon events outside its control. This construction is consistent with the Tax Court's longstanding treatment of sums deposited to secure a tenant's performance of a lease agreement, perhaps the closest analogy to the present situation. Pp. 207–214.

857 F. 2d 1162, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General*

Starr, Acting Assistant Attorney General Knapp, Alan I. Horowitz, Jonathan S. Cohen, and *William A. Whitledge.*

Larry J. Stroble argued the cause for respondent. With him on the brief was *Stanley C. Fickle.**

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent Indianapolis Power & Light Company (IPL) requires certain customers to make deposits with it to assure payment of future bills for electric service. Petitioner Commissioner of Internal Revenue contends that these deposits are advance payments for electricity and therefore constitute taxable income to IPL upon receipt. IPL contends otherwise.

I

IPL is a regulated Indiana corporation that generates and sells electricity in Indianapolis and its environs. It keeps its books on the accrual and calendar year basis. During the years 1974 through 1977, approximately 5% of IPL's residential and commercial customers were required to make deposits "to insure prompt payment," as the customers' receipts stated, of future utility bills. These customers were selected because their credit was suspect. Prior to March 10, 1976, the deposit requirement was imposed on a case-by-case basis. IPL relied on a credit test but employed no fixed formula. The amount of the required deposit ordinarily was twice the customer's estimated monthly bill. IPL paid 3% interest on a deposit held for six months or more. A customer could obtain a refund of the deposit prior to termination of service by requesting a review and demonstrating acceptable credit. The refund usually was made in cash or by check, but the cus-

*Briefs of *amici curiae* urging affirmance were filed for American Information Technologies Corporation et al. by *Jerome B. Libin, Bradley M. Seltzer, Jim J. Kilpatric,* and *Lawrence H. Cohen;* for El Paso Electric Company by *Stephen R. Nelson;* for Oak Industries, Inc., and Subsidiaries by *John P. Warner* and *Samuel M. Maruca;* and for Wisconsin Electric Power Co. and Affiliated Companies by *Joseph E. Tierney, Jr.,* and *Margaret T. Lund.*

tomer could choose to have the amount applied against future bills.

In March 1976, IPL amended its rules governing the deposit program. See 170 Ind. Admin. Code § 4–1–15 (1988). Under the amended rules, the residential customers from whom deposits were required were selected on the basis of a fixed formula. The interest rate was raised to 6% but was payable only on deposits held for 12 months or more. A deposit was refunded when the customer made timely payments for either 9 consecutive months, or for 10 out of 12 consecutive months so long as the 2 delinquent months were not themselves consecutive. A customer could obtain a refund prior to that time by satisfying the credit test. As under the previous rules, the refund would be made in cash or by check, or, at the customer's option, applied against future bills. Any deposit unclaimed after seven years was to escheat to the State. See Ind. Code § 32–9–1–6(a) (1988).[1]

IPL did not treat these deposits as income at the time of receipt. Rather, as required by state administrative regulations, the deposits were carried on its books as current liabilities. Under its accounting system, IPL recognized income when it mailed a monthly bill. If the deposit was used to offset a customer's bill, the utility made the necessary accounting adjustments. Customer deposits were not physically segregated in any way from the company's general funds. They were commingled with other receipts and at all times were subject to IPL's unfettered use and control. It is undisputed that IPL's treatment of the deposits was consistent with accepted accounting practice and applicable state regulations.

Upon audit of respondent's returns for the calendar years 1974 through 1977, the Commissioner asserted deficiencies. Although other items initially were in dispute, the parties were able to reach agreement on every issue except that of

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[1] During the years 1974 through 1977, the total amount that escheated to the State was less than $9,325. Stipulation of Facts ¶ 25.

the proper treatment of customer deposits for the years 1975, 1976, and 1977. The Commissioner took the position that the deposits were advance payments for electricity and therefore were taxable to IPL in the year of receipt. He contended that the increase or decrease in customer deposits outstanding at the end of each year represented an increase or decrease in IPL's income for the year.[2] IPL disagreed and filed a petition in the United States Tax Court for redetermination of the asserted deficiencies.

In a reviewed decision, with one judge not participating, a unanimous Tax Court ruled in favor of IPL. 88 T. C. 964 (1987). The court followed the approach it had adopted in *City Gas Co. of Florida* v. *Commissioner*, 74 T. C. 386 (1980), rev'd, 689 F. 2d 943 (CA11 1982). It found it necessary to "continue to examine all of the facts and circumstances," 88 T. C., at 976, and relied on several factors in concluding that the deposits in question were properly excluded from gross income. It noted, among other things, that only 5% of IPL's customers were required to make deposits; that the customer rather than the utility controlled the ultimate disposition of a deposit; and that IPL consistently treated the deposits as belonging to the customers, both by listing them as current liabilities for accounting purposes and by paying interest. *Id.*, at 976–978.

The United States Court of Appeals for the Seventh Circuit affirmed the Tax Court's decision. 857 F. 2d 1162 (1988). The court stated that "the proper approach to determining the appropriate tax treatment of a customer deposit is to look at the primary purpose of the deposit based on all the

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[2] The parties' stipulation sets forth the balance in IPL's customer-deposit account on December 31 of each of the years 1954, 1974, 1975, 1976, and 1977. In his notice of deficiency, the Commissioner concluded that IPL was required to include in income for 1975 the increase in the account between December 31, 1954, and December 31, 1975. For 1976 and 1977, IPL was allowed to reflect in income the respective decreases in the account during those years.

facts and circumstances . . . ." *Id.*, at 1167. The court appeared to place primary reliance, however, on IPL's obligation to pay interest on the deposits. It asserted that "as the interest rate paid on a deposit to secure income begins to approximate the return that the recipient would be expected to make from 'the use' of the deposit amount, the deposit begins to serve purposes that comport more squarely with a security deposit." *Id.*, at 1169. Noting that IPL had paid interest on the customer deposits throughout the period in question, the court upheld, as not clearly erroneous, the Tax Court's determination that the principal purpose of these deposits was to serve as security rather than as prepayment of income. *Id.*, at 1170.

Because the Seventh Circuit was in specific disagreement with the Eleventh Circuit's ruling in *City Gas Co. of Florida, supra*, we granted certiorari to resolve the conflict. 490 U. S. 1033 (1989).

II

We begin with the common ground. IPL acknowledges that these customer deposits are taxable as income upon receipt if they constitute *advance payments* for electricity to be supplied.[3] The Commissioner, on his part, concedes that customer deposits that secure the performance of non-income-producing covenants—such as a utility customer's obligation to ensure that meters will not be damaged—are not taxable income. And it is settled that receipt of a loan is not income to the borrower. See *Commissioner* v. *Tufts*, 461 U. S. 300, 307 (1983) ("Because of [the repayment] ob-

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[3] This Court has held that an accrual-basis taxpayer is required to treat advance payments as income in the year of receipt. See *Schlude* v. *Commissioner*, 372 U. S. 128 (1963); *American Automobile Assn.* v. *United States*, 367 U. S. 687 (1961); *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180 (1957). These cases concerned payments—nonrefundable fees for services—that indisputably constituted income; the issue was *when* that income was taxable. Here, in contrast, the issue is whether these deposits, as such, are income at all.

ligation, the loan proceeds do not qualify as income to the taxpayer"); *James* v. *United States*, 366 U. S. 213, 219 (1961) (accepted definition of gross income "excludes loans"); *Commissioner* v. *Wilcox*, 327 U. S. 404, 408 (1946). IPL, stressing its obligation to refund the deposits with interest, asserts that the payments are similar to loans. The Commissioner, however, contends that a deposit which serves to secure the payment of future income is properly analogized to an advance payment for goods or services. See Rev. Rul. 72–519, 1972–2 Cum. Bull. 32, 33 ("[W]hen the purpose of the deposit is to guarantee the customer's payment of amounts owed to the creditor, such a deposit is treated as an advance payment, but when the purpose of the deposit is to secure a property interest of the taxpayer the deposit is regarded as a true security deposit").

In economic terms, to be sure, the distinction between a loan and an advance payment is one of degree rather than of kind. A commercial loan, like an advance payment, confers an economic benefit on the recipient: a business presumably does not borrow money unless it believes that the income it can earn from its use of the borrowed funds will be greater than its interest obligation. See *Illinois Power Co.* v. *Commissioner*, 792 F. 2d 683, 690 (CA7 1986). Even though receipt of the money is subject to a duty to repay, the borrower must regard itself as better off after the loan than it was before. The economic benefit of a loan, however, consists entirely of the opportunity to earn income on the use of the money prior to the time the loan must be repaid. And in that context our system is content to tax these earnings as they are realized. The recipient of an advance payment, in contrast, gains both immediate use of the money (with the chance to realize earnings thereon) *and* the opportunity to make a profit by providing goods or services at a cost lower than the amount of the payment.

The question, therefore, cannot be resolved simply by noting that respondent derives some economic benefit from re-

ceipt of these deposits.[4] Rather, the issue turns upon the nature of the rights and obligations that IPL assumed when the deposits were made. In determining what sort of economic benefits qualify as income, this Court has invoked various formulations. It has referred, for example, to "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431 (1955). It also has stated: "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income . . . .'" *James* v. *United States*, 366 U. S., at 219, quoting *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424 (1932). IPL hardly enjoyed "complete dominion" over the customer deposits entrusted to it. Rather, these deposits were acquired subject to an express "obligation to repay," either at the time service was terminated or at the time a customer established good credit. So long as the customer fulfills his legal obligation to make timely payments, his deposit ultimately is to be refunded, and both the timing and method of that refund are largely within the control of the customer.

The Commissioner stresses the fact that these deposits were not placed in escrow or segregated from IPL's other funds, and that IPL therefore enjoyed unrestricted use of the money. That circumstance, however, cannot be dispositive. After all, the same might be said of a commercial loan; yet the Commissioner does not suggest that a loan is taxable upon receipt simply because the borrower is free to use the

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[4] See *Illinois Power Co.* v. *Commissioner*, 792 F. 2d 683, 690 (CA7 1986). See also Burke & Friel, Recent Developments in the Income Taxation of Individuals, Tax-Free Security: Reflections on *Indianapolis Power & Light*, 12 Rev. of Taxation of Individuals 157, 174 (1988) (arguing that economic-benefit approach is superior in theory, but acknowledging that "an economic-benefit test has not been adopted, and it is unlikely that such an approach will be pursued by the Service or the courts").

funds in whatever fashion he chooses until the time of repayment. In determining whether a taxpayer enjoys "complete dominion" over a given sum, the crucial point is not whether his use of the funds is unconstrained during some interim period. The key is whether the taxpayer has some guarantee that he will be allowed to keep the money. IPL's receipt of these deposits was accompanied by no such guarantee.

Nor is it especially significant that these deposits could be expected to generate income greater than the modest interest IPL was required to pay. Again, the same could be said of a commercial loan, since, as has been noted, a business is unlikely to borrow unless it believes that it can realize benefits that exceed the cost of servicing the debt. A bank could hardly operate profitably if its earnings on deposits did not surpass its interest obligations; but the deposits themselves are not treated as income.[5] Any income that the utility may earn through use of the deposit money of course is taxable, but the prospect that income will be generated provides no ground for taxing the principal.

The Commissioner's advance-payment analogy seems to us to rest upon a misconception of the value of an advance payment to its recipient. An advance payment, like the deposits at issue here, concededly protects the seller against the risk that it would be unable to collect money owed it after it has furnished goods or services. But an advance payment does much more: it protects against the risk that the purchaser will back out of the deal before the seller performs. From the moment an advance payment is made, the seller is assured that, so long as it fulfills its contractual obligation, the money is its to keep. Here, in contrast, a customer submitting a deposit made no commitment to purchase a specified quantity of electricity, or indeed to purchase any elec-

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[5] Cf. Rev. Rul. 71–189, 1971–1 Cum. Bull. 32 (inactive deposits are not income until bank asserts dominion over the accounts). See also *Fidelity-Philadelphia Trust Co.* v. *Commissioner*, 23 T. C. 527 (1954).

tricity at all.[6] IPL's right to keep the money depends upon the customer's purchase of electricity, and upon his later decision to have the deposit applied to future bills, not merely upon the utility's adherence to its contractual duties. Under these circumstances, IPL's dominion over the fund is far less complete than is ordinarily the case in an advance-payment situation.

The Commissioner emphasizes that these deposits frequently will be used to pay for electricity, either because the customer defaults on his obligation or because the customer, having established credit, chooses to apply the deposit to future bills rather than to accept a refund. When this occurs, the Commissioner argues, the transaction, from a cash-flow standpoint, is equivalent to an advance payment. In his view this economic equivalence mandates identical tax treatment.[7]

Whether these payments constitute income when received, however, depends upon the parties' rights and obligations *at the time the payments are made.* The problem with petitioner's argument perhaps can best be understood if we imagine a loan between parties involved in an ongoing commercial

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[6] A customer, for example, might terminate service the day after making the deposit. Also, IPL's dominion over a deposit remains incomplete even after the customer begins buying electricity. As has been noted, the deposit typically is set at twice the customer's estimated monthly bill. So long as the customer pays his bills in a timely fashion, the money he owes the utility (for electricity used but not yet paid for) almost always will be less than the amount of the deposit. If this were not the case, the deposit would provide inadequate protection. Thus, throughout the period the deposit is held, at least a portion is likely to be money that IPL has no real assurance of ever retaining.

[7] The Commissioner is unwilling, however, to pursue this line of reasoning to the limit of its logic. He concedes that these deposits would not be taxable if they were placed in escrow, Tr. of Oral Arg. 4; but from a cash-flow standpoint it does not make much difference whether the money is placed in escrow or commingled with the utility's other funds. In either case, the utility receives the money and allocates it to subsequent purchases of electricity if the customer defaults or chooses to apply his refund to a future bill.

relationship. At the time the loan falls due, the lender may decide to apply the money owed him to the purchase of goods or services rather than to accept repayment in cash. But this decision does not mean that the loan, when made, was an advance payment after all. The lender in effect has taken repayment of his money (as was his contractual right) and has chosen to use the proceeds for the purchase of goods or services from the borrower. Although, for the sake of convenience, the parties may combine the two steps, that decision does not blind us to the fact that in substance two transactions are involved.[8] It is this element of choice that distinguishes an advance payment from a loan. Whether these customer deposits are the economic equivalents of advance payments, and therefore taxable upon receipt, must be determined by examining the relationship between the parties at the time of the deposit. The individual who makes an advance payment retains no right to insist upon the return of the funds; so long as the recipient fulfills the terms of the bargain, the money is its to keep. The customer who submits a deposit to the utility, like the lender in the previous hypothetical, retains the right to insist upon repayment in cash; he may *choose* to apply the money to the purchase of electricity, but he assumes no obligation to do so, and the utility therefore acquires no unfettered "dominion" over the money at the time of receipt.

When the Commissioner examines privately structured transactions, the true understanding of the parties, of course, may not be apparent. It may be that a transfer of funds, though nominally a loan, may conceal an unstated agreement that the money is to be applied to the purchase of goods or

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[8] The Commissioner contends that a customer's decision to take his refund while making a separate payment for services, rather than applying the deposit to his bill, would amount to nothing more than an economically meaningless "exchange of checks." But in our view the "exchange of checks," while less convenient, more accurately reflects the economic substance of the transactions.

services. We need not, and do not, attempt to devise a test for addressing those situations where the nature of the parties' bargain is legitimately in dispute. This particular respondent, however, conducts its business in a heavily regulated environment; its rights and obligations vis-à-vis its customers are largely determined by law and regulation rather than by private negotiation. That the utility's customers, when they qualify for refunds of deposits, frequently choose to apply those refunds to future bills rather than taking repayment in cash does not mean that any customer has made an unspoken commitment to do so.

Our decision is also consistent with the Tax Court's long-standing treatment of lease deposits—perhaps the closest analogy to the present situation. The Tax Court traditionally has distinguished between a sum designated as a prepayment of rent—which is taxable upon receipt—and a sum deposited to secure the tenant's performance of a lease agreement. See, *e. g.*, *J. & E. Enterprises, Inc.* v. *Commissioner*, 26 TCM 944 (1967).[9] In fact, the customer deposits

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[9] In *J. & E. Enterprises* the Tax Court stated: "If a sum is received by a lessor at the beginning of a lease, is subject to his unfettered control, and is to be applied as rent for a subsequent period during the term of the lease, such sum is income in the year of receipt even though in certain circumstances a refund thereof may be required. . . . If, on the other hand, a sum is deposited to secure the lessee's performance under a lease, and is to be returned at the expiration thereof, it is not taxable income even though the fund is deposited with the lessor instead of in escrow and the lessor has temporary use of the money. . . . In this situation the acknowledged liability of the lessor to account for the deposited sum on the lessee's performance of the lease covenants prevents the sum from being taxable in the year of receipt." 26 TCM, at 945–946.

In Rev. Rul. 72–519, 1972–2 Cum. Bull. 32, the Commissioner relied in part on *J. & E. Enterprises* as authority for the proposition that deposits intended to secure income-producing covenants are advance payments taxable as income upon receipt, while deposits intended to secure nonincome-producing covenants are not. 1972–2 Cum. Bull., at 33. In our view, neither *J. & E. Enterprises* nor the other cases cited in the Revenue Ruling support that distinction. See *Hirsch Improvement Co.* v. *Commissioner*,

at issue here are less plausibly regarded as income than lease deposits would be. The typical lease deposit secures the tenant's fulfillment of a contractual obligation to pay a specified rent throughout the term of the lease. The utility customer, however, makes no commitment to purchase any services at all at the time he tenders the deposit.

We recognize that IPL derives an economic benefit from these deposits. But a taxpayer does not realize taxable income from every event that improves his economic condition. A customer who makes this deposit reflects no commitment to purchase services, and IPL's right to retain the money is contingent upon events outside its control. We hold that such dominion as IPL has over these customer deposits is insufficient for the deposits to qualify as taxable income at the time they are made.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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143 F. 2d 912 (CA2), cert. denied, 323 U. S. 750 (1944); *Mantell* v. *Commissioner*, 17 T. C. 1143 (1952); *Gilken Corp.* v. *Commissioner*, 10 T. C. 445 (1948), aff'd, 176 F. 2d 141 (CA6 1949). These cases all distinguish between advance payments and security deposits, not between deposits that do and do not secure income-producing covenants.

Syllabus

FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. *v.* CITY OF DALLAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87–2012. Argued October 4, 1989—Decided January 9, 1990*

Respondent city of Dallas adopted a comprehensive ordinance regulating "sexually oriented businesses," which are defined to include "adult" arcades, bookstores, video stores, cabarets, motels, and theaters, as well as escort agencies, nude model studios, and sexual encounter centers. Among other things, the ordinance requires that such businesses be licensed and includes civil disability provisions prohibiting certain individuals from obtaining licenses. Three groups of individuals and businesses involved in the adult entertainment industry filed separate suits challenging the ordinance on numerous grounds and seeking injunctive and declaratory relief. The District Court upheld the bulk of the ordinance but struck down several subsections, and the city subsequently amended the ordinance in conformity with the court's judgment. The Court of Appeals affirmed, holding, *inter alia*, that the ordinance's licensing scheme did not violate the First Amendment despite its failure to provide the procedural safeguards set forth in *Freedman* v. *Maryland*, 380 U. S. 51, and that its civil disability provisions and its provision requiring licensing for "adult motel owners" renting rooms for fewer than 10 hours were constitutional.

Held: The judgment is affirmed in part, reversed in part, and vacated in part, and the cases are remanded.

837 F. 2d 1298, affirmed in part, reversed in part, vacated in part, and remanded.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts III and IV, concluding that:

1. No petitioner has shown standing to challenge (1) the ordinance's provision which prohibits the licensing of an applicant who has resided with an individual whose license application has been denied or revoked, or (2) the civil disability provisions, which disable for specified periods those who have been convicted of certain enumerated crimes, as well as those whose spouses have been so convicted. The record does not re-

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*Together with No. 87–2051, *M. J. R., Inc., et al.* v. *City of Dallas*, and No. 88–49, *Berry et al.* v. *City of Dallas et al.*, also on certiorari to the same court.

veal that any petitioner was living with an individual whose application was denied or whose license was revoked. Moreover, although the record reveals one individual who potentially could be disabled under the spousal conviction provision, that person is not herself a license applicant or a party to this action. Even if she did have standing, however, her claim would now be moot, since the city council deleted from the list the crimes of which her husband was convicted after the District Court ruled that the inclusion of such convictions was unconstitutional. Furthermore, although one party stated in an affidavit that he had been convicted of three enumerated misdemeanors, he lacked standing, since he failed to state when he had been convicted of the last misdemeanor or the date of his release from confinement and, therefore, has not shown that he is still within the ordinance's disability period. This Court cannot rely on the city's representations at oral argument that one or two of the petitioners had been denied licenses based on convictions, since the necessary factual predicate must be gleaned from the record below. Similarly, the city's affidavit indicating that two licenses were revoked for convictions is unavailing, since the affidavit was first introduced in this Court and is not part of the record, and, in any event, fails to identify the individuals whose licenses were revoked. Because the courts below lacked jurisdiction to adjudicate petitioners' claims, the Court of Appeals' judgment with respect to the disability provisions is vacated, and the court is directed to dismiss that portion of the suit. Pp. 230–236.

2. The ordinance's provision requiring licensing for motels that rent rooms for fewer than 10 hours is not unconstitutional. The motel owner petitioners' contention that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for fewer than 10 hours results in increased crime or other secondary effects is rejected. As the Court of Appeals recognized, it was reasonable to believe that shorter rental time periods indicate that the motels foster prostitution, and that this type of criminal activity is what the ordinance seeks to suppress. The reasonableness of the legislative judgment, along with the Los Angeles study of the effect of adult motels on surrounding neighborhoods that was before the city council when it passed the ordinance, provided sufficient support for the limitation. Also rejected is the assertion that the 10-hour limitation places an unconstitutional burden on the right to freedom of association recognized in *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618. Even assuming that the motel owners have standing to assert the associational rights of motel patrons, limiting rentals to 10 hours will not have any discernible effect on the sorts of traditional personal bonds considered in *Roberts:* those that play a critical role in the Nation's culture and traditions by cultivating and transmitting shared ideals and beliefs. This Court

will not consider the motel owners' privacy and commercial speech challenges, since those issues were not pressed or passed upon below. Pp. 236–238.

JUSTICE O'CONNOR, joined by JUSTICE STEVENS and JUSTICE KENNEDY, concluded in Part II that the ordinance's licensing scheme violates the First Amendment, since it constitutes a prior restraint upon protected expression that fails to provide adequate procedural safeguards as required by *Freedman*, *supra*. Pp. 223–230.

(a) Petitioners may raise a facial challenge to the licensing scheme. Such challenges are permitted in the First Amendment context where the scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. Petitioners argue that the licensing scheme fails to set a time limit within which the licensing authority must act. Since *Freedman*, *supra*, at 56–57, held that such a failure is a species of unbridled discretion, every application of the ordinance creates an impermissible risk of suppression of ideas. Moreover, the businesses challenging the licensing scheme have a valid First Amendment interest. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment—*e. g.*, escort agencies and sexual encounter centers—it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of this litigation are protected by the First Amendment. While the city has asserted that it requires every business—regardless of whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes, the challenged ordinance nevertheless is more onerous with respect to sexually oriented businesses, which are required to submit to inspections—for example, when their ownership changes or when they apply for the annual renewal of their permits—whether or not they have moved or the use of their structures has changed. Pp. 223–225.

(b) *Freedman*, *supra*, at 58–60, determined that the following procedural safeguards were necessary to ensure expeditious decisionmaking by a motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. Thus, the license for a First Amendment-protected business must be issued in a reasonable period of time, and, accordingly, the first two *Freedman* safeguards are essential. Here, al-

though the Dallas ordinance requires the chief of police to approve the issuance of a license within 30 days after receipt of an application, it also conditions such issuance upon approval by other municipal inspection agencies without setting forth time limits within which those inspections must occur. Since the ordinance therefore fails to provide an effective time limitation on the licensing decision, and since it also fails to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement is unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand. However, since the licensing scheme at issue is significantly different from the censorship system examined in *Freedman*, it does not present the grave dangers of such a system, and the First Amendment does not require that it contain the third *Freedman* safeguard. Unlike the *Freedman* censor, Dallas does not engage in presumptively invalid direct censorship of particular expressive material, but simply performs the ministerial action of reviewing the general qualifications of each license applicant. It therefore need not be required to carry the burden of going to court or of there justifying a decision to suppress speech. Moreover, unlike the motion picture distributors considered in *Freedman*—who were likely to be deterred from challenging the decision to suppress a particular movie if the burdens of going to court and of proof were not placed on the censor—the license applicants under the Dallas scheme have every incentive to pursue a license denial through court, since the license is the key to their obtaining and maintaining a business. *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, is not dispositive of this litigation, since, although it struck down a licensing scheme for failing to provide adequate procedural safeguards, it did not address the proper scope of procedural safeguards with respect to such a scheme. Since the Dallas ordinance summarily states that its terms and provisions are severable, the Court of Appeals must, on remand, determine to what extent the licensing requirement is severable. Pp. 225–230.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE BLACKMUN, although agreeing that the ordinance's licensing scheme is invalid as to any First Amendment-protected business under the *Freedman* doctrine, concluded that *Riley* mandates application of all three of the *Freedman* procedural safeguards, not just two of them. *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 802, applied *Freedman* to invalidate a professional licensing scheme with respect to charity fundraisers who were engaged in First Amendment-protected activity, ruling that the scheme must require that the licensor—*i. e.*, the State, not the would-be fundraiser—either issue a license within a specified brief period *or go to court*. The principal opinion's grounds for de-

clining to require the third *Freedman* safeguard—that the Dallas scheme does not require an administrator to engage in the presumptively invalid task of passing judgment on whether the content of particular speech is protected, and that it licenses entire businesses, not just individual films, so that applicants will not be inclined to abandon their interests—do not distinguish the present litigation from *Riley*, where the licensor was not required to distinguish between protected and unprotected speech, and where the fundraisers had their entire livelihoods at stake. Moreover, the danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which the license was purportedly denied, but is the unlawful stifling of speech that results. Thus, there are no relevant differences between the fundraisers in *Riley* and the petitioners here, and, in the interest of protecting speech, the burdens of initiating judicial proceedings and of proof must be borne by the city. Pp. 239–242.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part II, in which STEVENS and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 238. WHITE, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 244. STEVENS, J., *post*, p. 249, and SCALIA, J., *post*, p. 250, filed opinions concurring in part and dissenting in part.

John H. Weston argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 87–2051 were *G. Randall Garrou*, *Cathy E. Crosson*, and *Richard L. Wilson*. *Arthur M. Schwartz* filed briefs for petitioners in No. 87–2012. *Frank P. Hernandez* filed a brief for petitioners in No. 88–49.

Analeslie Muncy argued the cause for respondents in all cases. With her on the brief were *Kenneth C. Dippel* and *Thomas P. Brandt*.†

†Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger;* and for PHE, Inc., by *Bruce J. Ennis, Jr.*, and *Mark D. Schneider*.

Briefs of *amici curiae* urging affirmance were filed for the American Family Association, Inc., by *Peggy M. Coleman;* for the Children's Legal Foundation by *Alan E. Sears;* for the National Institute of Municipal Law Officers

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Part II, in which JUSTICE STEVENS and JUSTICE KENNEDY join.

These cases call upon us to decide whether a licensing scheme in a comprehensive city ordinance regulating sexually oriented businesses is a prior restraint that fails to provide adequate procedural safeguards as required by *Freedman* v. *Maryland*, 380 U. S. 51 (1965). We must also decide whether any petitioner has standing to address the ordinance's civil disability provisions, whether the city has sufficiently justified its requirement that motels renting rooms for fewer than 10 hours be covered by the ordinance, and whether the ordinance impermissibly infringes on the right to freedom of association. As this litigation comes to us, no issue is presented with respect to whether the books, videos, materials, or entertainment available through sexually oriented businesses are obscene pornographic materials.

I

On June 18, 1986, the city council of the city of Dallas unanimously adopted Ordinance No. 19196 regulating sexually oriented businesses, which was aimed at eradicating the secondary effects of crime and urban blight. The ordinance, as amended, defines a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." Dallas City Code, ch. 41A, Sexually Oriented Businesses § 41A–2(19) (1986). The ordinance regulates sexually oriented businesses through a scheme incorporating zoning, li-

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by *William I. Thornton, Jr.*, *Frank B. Gummey III*, and *William H. Taube;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon* and *Peter Buscemi.*

Bruce A. Taylor filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae.*

censing, and inspections. The ordinance also includes a civil disability provision, which prohibits individuals convicted of certain crimes from obtaining a license to operate a sexually oriented business for a specified period of years.

Three separate suits were filed challenging the ordinance on numerous grounds and seeking preliminary and permanent injunctive relief as well as declaratory relief. Suits were brought by the following groups of individuals and businesses: those involved in selling, exhibiting, or distributing publications or video or motion picture films; adult cabarets or establishments providing live nude dancing or films, motion pictures, videocassettes, slides, or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners. Following expedited discovery, petitioners' constitutional claims were resolved through cross-motions for summary judgment. After a hearing, the District Court upheld the bulk of the ordinance, striking only four subsections. See *Dumas* v. *Dallas*, 648 F. Supp. 1061 (ND Tex. 1986). The District Court struck two subsections, §§ 41A–5(a)(8) and 41A–5(c), on the ground that they vested overbroad discretion in the chief of police, contrary to our holding in *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969). See 648 F. Supp., at 1072–1073. The District Court also struck the provision that imposed a civil disability merely on the basis of an indictment or information, reasoning that there were less restrictive alternatives to achieve the city's goals. See *id.*, at 1075 (citing *United States* v. *O'Brien*, 391 U. S. 367 (1968)). Finally, the District Court held that five enumerated crimes from the list of those creating civil disability were unconstitutional because they were not sufficiently related to the purpose of the ordinance. See 648 F. Supp., at 1074 (striking bribery, robbery, kidnaping, organized criminal activity, and violations of controlled substances Acts). The city of Dallas subsequently

amended the ordinance in conformity with the District Court's judgment.

The Court of Appeals for the Fifth Circuit affirmed. 837 F. 2d 1298 (1988). Viewing the ordinance as a content-neutral time, place, and manner regulation under *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), the Court of Appeals upheld the ordinance against petitioners' facial attack on the ground that it is "'designed to serve a substantial government interest'" and allowed for "'reasonable alternative avenues of communication.'" 837 F. 2d, at 1303 (quoting *Renton*, *supra*, at 47). The Court of Appeals further concluded that the licensing scheme's failure to provide the procedural safeguards set forth in *Freedman* v. *Maryland*, *supra*, withstood constitutional challenge, because such procedures are less important when regulating "the conduct of an ongoing commercial enterprise." 837 F. 2d, at 1303.

Additionally, the Court of Appeals upheld the provision of the ordinance providing that motel owners renting rooms for fewer than 10 hours were "adult motel owners" and, as such, were required to obtain a license under the ordinance. See §§ 41A–2(4), 41A–18. The motel owners attacked the provision on the ground that the city had made no finding that adult motels engendered the evils the city was attempting to redress. The Court of Appeals concluded that the 10-hour limitation was based on the reasonable supposition that short rental periods facilitate prostitution, one of the secondary effects the city was attempting to remedy. See 837 F. 2d, at 1304.

Finally, the Court of Appeals upheld the civil disability provisions, as modified by the District Court, on the ground that the relationship between "the offense and the evil to be regulated is direct and substantial." *Id.*, at 1305.

We granted petitioners' application for a stay of the mandate except for the holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution, 485 U. S.

1042 (1988), and granted certiorari, 489 U. S. 1051 (1989). We now reverse in part and affirm in part.

II

We granted certiorari on the issue whether the licensing scheme is an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman* v. *Maryland*, 380 U. S. 51 (1965). Petitioners involved in the adult entertainment industry and adult cabarets argue that the licensing scheme fails to set a time limit within which the licensing authority must issue a license and, therefore, creates the likelihood of arbitrary denials and the concomitant suppression of speech. Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 562 (1975).

A

We note at the outset that petitioners raise a facial challenge to the licensing scheme. Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. See *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 798, and n. 15 (1984). In *Freedman*, we held that the failure to place limitations on the time within which a censorship board decisionmaker must make a determination of obscenity is a species of unbridled discretion. See *Freedman*, *supra*, at 56–57 (failure to confine time within which censor must make decision "contains the same vice as a statute delegating excessive administrative discretion"). Thus, where a scheme creates a "[r]isk of delay," 380 U. S., at 55,

such that "every application of the statute create[s] an impermissible risk of suppression of ideas," *Taxpayers for Vincent*, *supra*, at 798, n. 15, we have permitted parties to bring facial challenges.

The businesses regulated by the city's licensing scheme include adult arcades (defined as places in which motion pictures are shown to five or fewer individuals at a time, see § 41A–2(1)), adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers, §§ 41A–2(19) and 41A–3. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment, *e. g.*, escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of these cases are protected by the First Amendment. Cf. *Smith* v. *California*, 361 U. S. 147, 150 (1959) (bookstores); *Southeastern Promotions, Ltd.* v. *Conrad*, *supra* (live theater performances); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976) (motion picture theaters); *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981) (nude dancing). As JUSTICE SCALIA acknowledges, *post*, at 262, the city does not argue that the businesses targeted are engaged in purveying obscenity which is unprotected by the First Amendment. See Brief for Respondents 19, 20, and n. 8 ("[T]he city is not arguing that the ordinance does not raise First Amendment concerns . . . . [T]he right to sell this material is a constitutionally protected right . . ."). See also *Miller* v. *California*, 413 U. S. 15, 23–24 (1973). Nor does the city rely upon *Ginzburg* v. *United States*, 383 U. S. 463 (1966), or contend that those businesses governed by the ordinance are engaged in pandering. It is this Court's practice to decline to review those issues neither pressed nor passed upon below. See *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976) *(per curiam)*.

The city asserted at oral argument that it requires every business—without regard to whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes. Tr. of Oral Arg. 49; see also App. 42, Dallas City Code § 51–1.104 (1988) (certificate of occupancy required where there is new construction or before occupancy if there is a change in use). Under the challenged ordinance, however, inspections are required for sexually oriented businesses whether or not the business has moved into a new structure and whether or not the use of the structure has changed. Therefore, even assuming the correctness of the city's representation of its "general" inspection scheme, the scheme involved here is more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses. For example, inspections are required whenever ownership of a sexually oriented business changes, and when the business applies for the annual renewal of its permit. We, therefore, hold, as a threshold matter, that petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest.

B

While "[p]rior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 558. See, *e. g., Lovell* v. *Griffin,* 303 U. S. 444, 451–452 (1938); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306–307 (1940); *Cox* v. *New Hampshire,* 312 U. S. 569, 574–575 (1941); *Shuttlesworth* v. *Birmingham,* 394 U. S., at 150–151. Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint

and may result in censorship." *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 757 (1988). See *Saia* v. *New York*, 334 U. S. 558 (1948); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Shuttlesworth* v. *Birmingham*, *supra*; *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984). "'It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttlesworth*, *supra*, at 151 (quoting *Staub*, *supra*, at 322).

Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible. *Freedman*, *supra*, at 59; *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 316 (1980) (striking statute on ground that it restrained speech for an "indefinite duration"). In *Freedman*, we addressed a motion picture censorship system that failed to provide for adequate procedural safeguards to ensure against unlimited suppression of constitutionally protected speech. 380 U. S., at 57. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. In *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988), this Court held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." *Id.*, at 802. The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegat-

ing excessive administrative discretion," *Freedman*, *supra*, at 56–57. Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.

Although the ordinance states that the "chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." § 41A–5(a)(6). Moreover, the ordinance does not set a time limit within which the inspections must occur. The ordinance provides no means by which an applicant may ensure that the business is inspected within the 30-day time period within which the license is purportedly to be issued if approved. The city asserted at oral argument that when applicants apply for licenses, they are given the telephone numbers of the various inspection agencies so that they may contact them. Tr. of Oral Arg. 48. That measure, obviously, does not place any limits on the time within which the city will inspect the business and thereby make the business eligible for the sexually oriented business license. Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license.

In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman*, *supra*, at 58–60.

Although we struck the licensing provision in *Riley* v. *National Federation of Blind of N. C., Inc.*, *supra*, on the ground that it did not provide adequate procedural safeguards, we did not address the proper scope of procedural safeguards with respect to a licensing scheme. Because the licensing scheme at issue in these cases does not present the grave "dangers of a censorship system," *Freedman*, *supra*, at 58, we conclude that the full procedural protections set forth in *Freedman* are not required.

The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. See *Freedman*, *supra*, at 51. See also *Shuttlesworth*, *supra*, at 155, n. 4 (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977).

The Court in *Freedman* also required the censor to go to court and to bear the burden in court of justifying the denial.

> "Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country . . . ." 380 U. S., at 59.

Moreover, a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *Southeastern Promotions*, 420 U. S., at 559.

As discussed *supra*, the Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand.

The Court also required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. In *Freedman*, the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the

license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963).

Finally, we note that § 5 of Ordinance No. 19196 summarily states that "[t]he terms and provisions of this ordinance are severable, and are governed by Section 1–4 of CHAPTER 1 of the Dallas City Code, as amended." We therefore remand to the Court of Appeals for further determination whether and to what extent the licensing scheme is severable. Cf. *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S., at 772 (remanding for determination of severability).

III

We do not reach the merits of the adult entertainment and adult cabaret petitioners' challenges to the civil disability provision, § 41A–5(a)(10), and the provision disabling individuals residing with those whose licenses have been denied or revoked, § 41A–5(a)(5), because petitioners have failed to show they have standing to challenge them. See Brief for Petitioners in No. 87–2051, pp. 22–40, 44; Brief for Petitioners in No. 87–2012, pp. 12–20. Neither the District Court nor the Court of Appeals determined whether petitioners had standing to challenge any particular provision of the ordinance. Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, see *Jenkins* v. *McKeithen*, 395 U. S. 411, 421 (1969), and even if the parties fail to raise the issue before

us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." *Allen* v. *Wright*, 468 U. S. 737, 750 (1984).

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.'" *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986).

It is a long-settled principle that standing cannot be "inferred argumentatively from averments in the pleadings," *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 284 (1883), but rather "must affirmatively appear in the record." *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884). See *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887) (facts supporting Article III jurisdiction must "appea[r] affirmatively from the record"). And it is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth* v. *Seldin*, 422 U. S. 490, 518 (1975). Thus, petitioners in this case must "allege . . . facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing." *McNutt*, *supra*, at 189.

The ordinance challenged here prohibits the issuance of a license to an applicant who has resided with an individual whose license application has been denied or revoked within

the preceding 12 months.[1] The ordinance also has a civil disability provision, which disables those who have been convicted of certain enumerated crimes as well as those whose spouses have been convicted of the same enumerated crimes. This civil disability lasts for two years in the case of misdemeanor convictions and five years in the case of conviction of a felony or of more than two misdemeanors within a 24-month period.[2] Thus, under the amended ordinance, once the dis-

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[1] Section 41A–5(a)(5) provides as follows: "The chief of police shall approve the issuance of a license . . . unless he finds [that] . . . [a]n applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months."

[2] Sections 41A–5(a)(10), (b), and (c), as amended, provide as follows:

"The chief of police shall approve the issuance of a license . . . unless he finds [that] . . .

"(10) An applicant or an applicant's spouse has been convicted of a crime:

"(A) involving:

"(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

"(aa) prostitution;

"(bb) promotion of prostitution;

"(cc) aggravated promotion of prostitution;

"(dd) compelling prostitution;

"(ee) obscenity;

"(ff) sale, distribution, or display of harmful material to minor;

"(gg) sexual performance by a child;

"(hh) possession of child pornography;

"(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:

"(aa) public lewdness;

"(bb) indecent exposure;

"(cc) indecency with a child;

"(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

"(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or

"(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

ability period has elapsed, the applicant may not be denied a license on the ground of a former conviction.

Examination of the record here reveals that no party has standing to challenge the provision involving those residing with individuals whose licenses were denied or revoked. Nor does any party have standing to challenge the civil disability provision disabling applicants who were either convicted of the specified offenses or whose spouses were convicted.

First, the record does not reveal that any party before us was living with an individual whose license application was denied or whose license was revoked. Therefore, no party has standing with respect to § 41A–5(a)(5). Second, § 41A–5(a)(10) applies to applicants whose spouses have been convicted of any of the enumerated crimes, but the record reveals only one individual who could be disabled under this provision. An individual, who had been convicted under the Texas Controlled Substances Act, asserts that his wife was interested in opening a sexually oriented business. But the wife, although an officer of petitioner Bi-Ti Enterprises, Inc.,

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"(B) for which:

"(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

"(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

"(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

"(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

"(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A–5(a)(10)(B) has elapsed."

is not an applicant for a license or a party to this action. See 12 Record, Evert Affidavit 3–6. Cf. *Bender*, 475 U. S., at 548, and n. 9.

Even if the wife did have standing, her claim would now be moot. Her husband's convictions under the Texas Controlled Substances Act would not now disable her from obtaining a license to operate a sexually oriented business, because the city council, following the District Court's decision, deleted the provision disabling those with convictions under the Texas Controlled Substances Act or Dangerous Drugs Act. App. H. to Pet. for Cert. in No. 87–2012, p. 107. See *Hall* v. *Beals*, 396 U. S. 45, 48 (1969).

Finally, the record does not reveal any party who has standing to challenge the provision disabling an applicant who was convicted of any of the enumerated crimes. To establish standing to challenge that provision the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance. See §§ 41A–5(a)(10)(A), (B). If the disability period has elapsed, the applicant is not deprived of the possibility of obtaining a license and, therefore, cannot be injured by the provision.

The only party who could plausibly claim to have standing to challenge this provision is Bill Staten, who stated in an affidavit that he had been "convicted of three misdemeanor obscenity violations within a twenty-four month period." 7 Record, Staten Affidavit 2. That clearly satisfies the first requirement. Under the ordinance, any person convicted of two or more misdemeanors "within any 24-month period," must wait five years following the last conviction or release from confinement, whichever is later, before a license may be issued. See § 41A–5(a)(10)(B)(iii). But Staten failed to state when he had been convicted of the last misdemeanor or the date of release from confinement and, thus, has failed "clearly to allege facts demonstrating that he is a proper

party" to challenge the civil disability provisions. No other petitioner has alleged facts to establish standing, and the District Court made no factual findings that could support standing. Accordingly, we conclude that the petitioners lack standing to challenge the provisions. See *Warth*, 422 U. S., at 518.

At oral argument, the city's attorney responded as follows when asked whether there was standing to challenge the civil disability provisions: "I believe that there are one or two of the Petitioners that have had their licenses denied based on criminal conviction." Tr. of Oral Arg. 32. See also Foster Affidavit 1 (affidavit filed by the city in its Response to Petitioner's Application for Recall and Stay of the Mandate stating that two licenses were *revoked* on the grounds of a prior conviction since the ordinance went into effect but failing to identify the licensees). We do not rely on the city's representations at argument as "the necessary factual predicate may not be gleaned from the briefs and arguments themselves," *Bender*, *supra*, at 547. And we may not rely on the city's affidavit, because it is evidence first introduced to this Court and "is not in the record of the proceedings below," *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157, n. 16 (1970). Even if we could take into account the facts as alleged in the city's affidavit, it fails to identify the individuals whose licenses were revoked and, therefore, falls short of establishing that any petitioner before this Court has had a license revoked under the civil disability provisions.

Because we conclude that no petitioner has shown standing to challenge either the civil disability provisions or the provisions involving those who live with individuals whose licenses have been denied or revoked, we conclude that the courts below lacked jurisdiction to adjudicate petitioners' claims with respect to those provisions. We accordingly vacate the judgment of the Court of Appeals with respect to those provisions with directions to dismiss that portion of the action. See *Bender*, *supra*, at 549 (vacating judgment below on

ground of lack of standing); *McNutt*, 298 U. S., at 190 (same).[3]

IV

The motel owner petitioners challenge two aspects of the ordinance's requirement that motels that rent rooms for fewer than 10 hours are sexually oriented businesses and are, therefore, regulated under the ordinance. See § 41A–18(a). First, they contend that the city had an insufficient factual basis on which to conclude that rental of motel rooms for fewer than 10 hours produced adverse impacts. Second, they contend that the ordinance violates privacy rights, especially the right to intimate association.

With respect to the first contention, the motel owners assert that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for fewer than 10 hours results in increased crime or other secondary effects. They contend that the council had before it only a 1977 study by the city of Los Angeles that considered cursorily the effect of adult motels on surrounding neighborhoods. See Defendant's Motion for Summary Judgment, Vol. 2, Exh. 11. The Court of Appeals thought it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress. See 837 F. 2d, at 1304. Therefore, no more extensive studies were required than those already available. We agree with the Court of Appeals that the reasonableness of the legislative judgment, combined with the Los Angeles study, is adequate to support the city's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme.

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[3] Petitioners also raise a variety of other First Amendment challenges to the ordinance's licensing scheme. In light of our conclusion that the licensing requirement is unconstitutional because it lacks essential procedural safeguards and that no petitioner has standing to challenge the residency or civil disability provisions, we do not reach those questions.

The motel owners also assert that the 10-hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association recognized in *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618 (1984) ("Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships"). The city does not challenge the motel owners' standing to raise the issue whether the associational rights of their motel patrons have been violated. There can be little question that the motel owners have "a live controversy against enforcement of the statute" and, therefore, that they have Art. III standing. *Craig* v. *Boren*, 429 U. S. 190, 192 (1976). It is not clear, however, whether they have prudential, *jus tertii* standing to challenge the ordinance on the ground that the ordinance infringes the associational rights of their motel patrons. *Id.*, at 193. But even if the motel owners have such standing, we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts*. Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." 468 U. S., at 618–619. We therefore reject the motel owners' challenge to the ordinance.

Finally, the motel owners challenge the regulations on the ground that they violate the constitutional right "to be let alone," *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting), and that the ordinance infringes the motel owners' commercial speech rights. Because these issues were not pressed or passed upon below, we decline to consider them. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 628, n. 10 (1982); *FTC* v. *Grolier Inc.*, 462 U. S. 19, 23, n. 6 (1983).

Accordingly, the judgment below is affirmed in part, reversed in part, and vacated in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

I concur in the judgment invalidating the Dallas licensing provisions, as applied to any First Amendment-protected business, because I agree that the licensing scheme does not provide the procedural safeguards required under our previous cases.[1] I also concur in the judgment upholding the provisions applicable to adult motels, because I agree that the motel owners' claims are meritless. I agree further that it is not necessary to reach petitioners' other First Amendment challenges. I write separately, however, because I believe that our decision two Terms ago in *Riley* v. *National Fed-*

[1] JUSTICE SCALIA's opinion concurring in part and dissenting in part, purportedly grounded in my opinion in *Ginzburg* v. *United States*, 383 U. S. 463 (1966), does not persuade me otherwise. In *Ginzburg*, this Court held merely that, in determining whether a given publication was obscene, a court could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale, and advertising. *Id.*, at 465–466. The opinion concluded: "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged." *Id.*, at 475. As JUSTICE O'CONNOR's opinion makes clear, *ante* at 220, there is no "obscenity vel non" question in this case.

What *Ginzburg* did not do, and what this Court has never done, despite JUSTICE SCALIA's claims, is to abrogate First Amendment protection for an entire category of speech-related businesses. We said in *Ginzburg* that we perceived "no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question." 383 U. S., at 474. History has proved us right, I think, that the decision itself left First Amendment guarantees secure. JUSTICE SCALIA's transmogrification of *Ginzburg*, however, is far from innocuous.

eration of Blind of N. C., Inc., 487 U. S. 781 (1988), mandates application of all three of the procedural safeguards specified in *Freedman* v. *Maryland*, 380 U. S. 51 (1965), not just two of them, and also to point out that Part III of JUSTICE O'CONNOR's opinion reaches a question not necessary to the decision.

I

In *Freedman* v. *Maryland*, *supra*, as JUSTICE O'CONNOR notes, we held that three procedural safeguards are needed to "obviate the dangers of a censorship system": (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor must bear both the burden of going to court and the burden of proof in court. 380 U. S., at 58–59. *Freedman* struck down a statute that required motion picture houses to submit films for prior approval, without providing any of these protections. Similar cases followed, *e. g.*, *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968) (invalidating another motion picture censorship ordinance for failure to provide adequate *Freedman* procedures); *Blount* v. *Rizzi*, 400 U. S. 410 (1971) (invalidating postal rules permitting restrictions on the use of the mails for allegedly obscene materials because the rules lacked *Freedman* safeguards); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) (finding unconstitutional a city's refusal to rent municipal facilities for a musical because of its content, absent *Freedman* procedures).

We have never suggested that our insistence on *Freedman* procedures might vary with the particular facts of the prior restraint before us. To the contrary, this Court has continued to require *Freedman* procedures in a wide variety of contexts. In *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977), we held that even a court-ordered injunction must be stayed if appellate review is not expedited.

Id., at 44. And in *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980), we held that a general public nuisance statute could not be applied to enjoin a motion picture theater's future exhibition of films for a year, based on a presumption that such films would be obscene merely because prior films had been, when such a determination could be constitutionally made only in accordance with *Freedman* procedures. 445 U. S., at 317.

Two Terms ago, in *Riley*, this Court applied *Freedman* to a professional licensing scheme because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" 487 U. S., at 802, quoting and applying *Freedman*, *supra*, at 59. The North Carolina statute did not so provide, and we struck it down. 487 U. S., at 802.

In *Riley*, this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser. Because I see no relevant difference between the fundraisers in *Riley* and the bookstores and motion picture theaters in these cases, I would hold that the city of Dallas must bear the burden of going to court and proving its case before it may permissibly deny licenses to First Amendment-protected businesses.

JUSTICE O'CONNOR bases her disinclination to require the third *Freedman* procedure on two grounds: the Dallas licensing scheme does not involve an administrator's passing judgment on whether the content of particular speech is protected or not; and the Dallas scheme licenses entire businesses, not just individual films. JUSTICE O'CONNOR finds the first distinction significant on the theory that our jurisprudence holds only that suppression of speech on the ostensible ground of

content is presumptively invalid. She finds the second significant because it anticipates that applicants with an entire business at stake will pursue their interests in court rather than abandon them.

While JUSTICE O'CONNOR is certainly correct that these aspects distinguish the facts before us from those in *Freedman*, neither ground distinguishes these cases from *Riley*. The licensor in *Riley* was not required to distinguish between protected and unprotected speech. He was reviewing applications to practice a particular profession, just as the city of Dallas is acting on applications to operate particular businesses. Similarly, the fundraisers in *Riley* had their entire livelihoods at stake, just as the bookstores and others subject to the Dallas ordinance. Nonetheless, this Court placed the burden of going to court on the State, not the applicant.[2] 487 U. S., at 802.

Moreover, I believe *Riley* was rightly decided for the same reasons that the limitation set forth in JUSTICE O'CONNOR's opinion is wrong. The danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which that license was purportedly denied. The danger posed is the unlawful stifling of speech that results. As we said in *Freedman*, it is "the transcendent value of speech" that places the burden of persuasion on the State. 380 U. S., at 58. The heavy presumption against prior restraints requires no less. JUSTICE O'CONNOR does not, nor could she, contend that those administering this ordinance will always act according to their own law. Mistakes are inevitable; abuse is possible. In distributing the burdens of initiating judicial proceedings and proof, we are obliged

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[2] *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980), also involved censorship that threatened proprietors' entire businesses, rather than single films. This Court, notwithstanding, affirmed the Court of Appeals which had held that the statute was unconstitutional because it lacked the procedural safeguards required under *Freedman*. 445 U. S., at 314, 317.

to place them such that we err, if we must, on the side of speech, not on the side of silence.

II

In Part III of the opinion, JUSTICE O'CONNOR considers at some length whether petitioners have made an adequate showing of standing to bring their claims against the cohabitation and civil disability provisions of the licensing scheme. Were it of some precedential value, I would question this Court's reversal of the findings of both the District Court and the Court of Appeals[3] that petitioners had standing to bring their claims, where the basis for reversal is an affidavit that is at worst merely ambiguous. But because the discussion is wholly extraneous to the actual holding in this case, I write only to clarify that Part III is unnecessary to the decision and is pure dictum.

The first claim for which the Court fails to find a petitioner with standing—an unspecified objection to the provision denying a license to any applicant residing with someone whose own application has been denied or revoked within the past year—is not directly presented by the parties, was not reached by the court below, and is not among the questions on which certiorari was granted. The second claim for which the Court fails to find a petitioner with standing—petitioners' objection to the ordinance's civil disability provisions—is clearly before this Court, but consideration of this claim is rendered redundant by JUSTICE O'CONNOR's holding in Part II.

The civil disability claim is an objection to that part of the licensing scheme which provides for denial or revocation of a license because of prior criminal convictions, on the ground

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[3] Both the District Court and the Fifth Circuit, after finding that plaintiffs had standing to challenge the ordinance, reached the civil disability question. See 837 F. 2d 1298, 1301, 1304–1305 (1988); *Dumas* v. *Dallas*, 648 F. Supp. 1061 (ND Tex. 1986).

that these provisions "impose an impermissible prior restraint upon protected expression." Brief for Petitioners FW/PBS, Inc., et al. 12.[4] Because the challenge is based solely on the First Amendment, a victory on the merits would benefit only those otherwise regulated businesses which are protected by the First Amendment.

But since the Court invalidates the application of the entire Dallas licensing scheme to any First Amendment-protected business under the *Freedman* doctrine, it is unnecessary to decide whether some or all of the same provisions are also invalid, as to First Amendment-protected businesses, on other grounds. JUSTICE O'CONNOR recognizes this and wisely declines to reach petitioners' challenge to various requirements under the licensing scheme, other than the civil disability and cohabitation provisions, on the First Amendment ground that the ordinance impermissibly singles out persons and businesses engaged in First Amendment-protected activities for regulation.[5]

For reasons unexplained and inexplicable, the opinion separates the prior restraint and singling out claims and accords them different treatment. Perhaps, if the inquiry had reached the merits of the prior restraint claim, one could infer a motive to take the opportunity to offer guidance in an area of the law badly in need of it. But because the inquiry proceeds no further than jurisdiction, no such explanation is available. Whatever the reason for including Part III, it is superfluous.

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[4] Petitioners M. J. R., Inc., et al. phrase the same objection slightly differently. They characterize license denial or revocation based on certain listed prior speech offenses as a "classic prior restraint of the type prohibited as facially unconstitutional under the rule of *Near* v. *Minnesota [ex rel. Olson]*, 283 U. S. 697 (1931)," and they characterize license denial or revocation based on other listed prior offenses as "prior restraints which cannot withstand strict scrutiny and are therefore invalid under the first amendment." See Brief for Petitioners M. J. R., Inc., et al. 22, 33.

[5] See Brief for Petitioners FW/PBS, Inc., et al. 21–24.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join Parts I, III, and IV of the Court's opinion but do not agree with the conclusion in Part II that the Dallas ordinance must include two of the procedural safeguards set forth in *Freedman* v. *Maryland*, 380 U. S. 51 (1965), in order to defeat a facial challenge. I would affirm the Fifth Circuit's holding that *Freedman* is inapplicable to the Dallas scheme.

The Court has often held that when speech and nonspeech elements "are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). See also *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 298–299 (1984); *Cox* v. *Louisiana*, 379 U. S. 559, 562–564 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 48, n. 7 (1966). Our cases upholding time, place, and manner restrictions on sexually oriented expressive activity are to the same effect. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication. *Renton*, *supra*, at 47. See also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 647–648 (1981); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976). *Renton* and *Young* also make clear that there is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them and that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral.

JUSTICE O'CONNOR does not suggest that the businesses involved here are immune from the kind of regulation sustained in *Young* and *Renton*. Neither is it suggested that the prerequisites for obtaining a license, such as certificates of occupancy and inspections, do not serve the same kind of a substantial governmental interest dealt with in those cases nor that the licensing system fails the test of content neutrality. The ordinance in no way is aimed at regulating what may be sold or offered in the covered businesses. With a license, operators can sell anything but obscene publications. Without one—without satisfying the licensing requirements—they can sell nothing because the city is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses.

JUSTICE O'CONNOR nevertheless invalidates the licensing provisions for failure to provide some of the procedural requirements that *Freedman* v. *Maryland*, *supra*, imposed in connection with a Maryland law forbidding the exhibition of any film without the approval of a board of censors. There, the board was approving or disapproving every film based on its view of the film's content and its suitability for public viewing. Absent procedural safeguards, the law imposed an unconstitutional prior restraint on exhibitors. As I have said, however, nothing like that is involved here; the predicate identified in *Freedman* for imposing its procedural requirements is absent in these cases.

Nor is there any other good reason for invoking *Freedman*. The Dallas ordinance is in many respects analogous to regulations requiring parade or demonstration permits and imposing conditions on such permits. Such regulations have generally been treated as time, place, and manner restrictions and have been upheld if they are content neutral, serve a substantial governmental interest, and leave open alternative avenues of communication. *Cox* v. *New Hampshire*, 312 U. S. 569, 574–576 (1941); *Clark* v. *Community for Creative Non-Violence*, *supra*, at 293–298. The Dallas scheme regu-

lates who may operate sexually oriented businesses, including those who sell materials entitled to First Amendment protection; but the ordinance does not regulate content and thus it is unlike the content-based prior restraints that this Court has typically scrutinized very closely. See, *e. g.*, *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977); *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980); *Freedman* v. *Maryland*, *supra*.

Licensing schemes subject to First Amendment scrutiny, however, even though purporting to be time, place, and manner restrictions, have been invalidated when undue discretion has been vested in the licensor. Unbridled discretion with respect to the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint. *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–152 (1969); *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 757 (1988); *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948). That rule reflects settled law with respect to licensing in the First Amendment context. But here there is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by the ordinance before us. Here, the Court of Appeals specifically held that the ordinance did not vest undue discretion in the licensor because the ordinance provides sufficiently objective standards for the chief of police to apply. 837 F. 2d 1298, 1305–1306 (CA5 1988). JUSTICE O'CONNOR's opinion does not disturb this aspect of the Court of Appeals' decision, and because it does not, one arguably tenable reason for invoking *Freedman* disappears.

Additionally, petitioners' reliance on *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988), is misplaced. *Riley* invalidated a licensing requirement for professional fundraisers which prevented them from solicit-

ing prior to obtaining a license, but which permitted non-professionals to solicit while their license applications were pending. We there held that a professional fundraiser was a speaker entitled to First Amendment protection and that because "the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter," *id.*, at 801, the requirement was subject to First Amendment scrutiny to make sure that the licensor's discretion was suitably confined. *Riley* thus appears to be a straightforward application of the "undue-discretion" line of cases. The Court went on to say, however, that even assuming, as North Carolina urged, that the licensing requirement was a time, place, and manner restriction, *Freedman* v. *Maryland*, 380 U. S. 51 (1965), required that there be provision for either acting on the license application or going to court within a specified brief period of time.

Contrary to the ordinance in these cases, the *Riley* licensing requirement was aimed directly at speech. The discretion given the licensors in *Riley* empowered them to affect the content of the fundraiser's speech, unless that discretion was suitably restrained. In that context, the Court invoked *Freedman*. That basis for applying *Freedman* is not present here, for, as I have said, the licensor is not vested with undue discretion.

Neither is there any basis for holding that businesses dealing in expressive materials have been singled out; all sexually oriented businesses—including those not involved in expressive activity such as escort agencies—are covered, and all other businesses must live up to the building codes, as well as fire and health regulations. Furthermore, the Court should not assume that the licensing process will be unduly prolonged or that inspections will be arbitrarily delayed. There is no evidence that this has been the case, or that inspections in other contexts have been delayed or neglected. Between the time of the District Court's judgment and that of the

Fifth Circuit, Dallas granted some 147 out of 165 license requests, and none of the petitioners in making this facial challenge to the ordinance asserts that its license application was not promptly dealt with, that it was unable to obtain the required inspections promptly, or that it was unable to secure reasonably prompt review of a denial. Clearly the licensing scheme neither imposes nor results in a ban of any type of adult business.

I see no basis for invalidating this ordinance because it fails to include some prophylactic measures that will guard against highly speculative injuries. As JUSTICE O'CONNOR notes in the course of refusing to apply one of the *Freedman* procedural mandates, the licensing in these cases is required of sexually oriented businesses, enterprises that will have every incentive to pursue the license applications vigorously. *Ante*, at 229–230. The ordinance requires that an application be acted on within 30 days. Licensing decisions suspending or revoking a license are immediately appealable to a permit and license appeal board and are stayed pending that appeal. In addition, no one suggests that licensing decisions are not subject to immediate appeal to the courts. As I see it, there is no realistic prospect that the requirement of a license will have anything more than an incidental effect on the sale of protected materials.

Perhaps JUSTICE O'CONNOR is saying that those who deal in expressive materials are entitled to special procedures in the course of complying with otherwise valid, neutral regulations generally applicable to all businesses. I doubt, however, that bookstores or radio or television stations must be given special breaks in the enforcement of general health, building, and fire regulations. If they must, why would not a variety of other kinds of businesses, like supermarkets and convenience stores that sell books and magazines, also be so entitled? I question that there is authority to be found in our cases for such a special privilege.

For the foregoing reasons, I respectfully dissent from Part II of JUSTICE O'CONNOR's opinion.

JUSTICE STEVENS, concurring in part and dissenting in part.

As the Court explains in Part III of its opinion, it is not certain that any petitioner has standing to challenge the provisions of the licensing scheme that disqualify applicants who are themselves unqualified or who reside with, or are married to, unqualified persons. Given the breadth of those provisions, the assertions in the Staten and Foster affidavits, and the District Court's understanding of the relevant facts, however, I cannot join the decision to direct dismissal of this portion of the litigation. See *ante*, at 235. I would remand for an evidentiary hearing on the standing issues.

I join Parts I, II, and IV of JUSTICE O'CONNOR's opinion. With respect to JUSTICE SCALIA's proposed resurrection of *Ginzburg* v. *United States*, 383 U. S. 463 (1966), I have this comment. As I explained in my dissenting opinion in *Splawn* v. *California*, 431 U. S. 595, 602 (1977), *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner. Any other result would be perverse:

> "Signs which identify the 'adult' character of a motion picture theater or of a bookstore convey the message that sexually provocative entertainment is to be found within . . . . Such signs . . . provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to

some and offensive to others ought to be encouraged, not punished." 431 U. S., at 604.

JUSTICE SCALIA, concurring in part and dissenting in part.

I join Part I of the Court's opinion, Part III, holding that there is no standing to challenge certain portions of the Dallas ordinance, and Part IV, sustaining on the merits certain other portions. I dissent from the judgment, however, because I would affirm the Fifth Circuit's holding that the ordinance is constitutional in all respects before us.

I

Since this Court first had occasion to apply the First Amendment to materials treating of sex, some three decades ago, we have been guided by the principle that "sex and obscenity are not synonymous," *Roth* v. *United States*, 354 U. S. 476, 487 (1957). The former, we have said, the Constitution permits to be described and discussed. The latter is entirely unprotected, and may be allowed or disallowed by States or communities, as the democratic majority desires.

Distinguishing the one from the other has been the problem. Obscenity, in common understanding, is material that "treat[s] sex in a manner appealing to prurient interest," *id.*, at 488. But for constitutional purposes we have added other conditions to that definition, out of an abundance of concern that "the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Ibid.* To begin with, we rejected the approach previously adopted by some courts, which would permit the banning of an entire literary work on the basis of one or several passages that in isolation could be considered obscene. Instead, we said, "the dominant theme of the material *taken as a whole*" must appeal to prurient interest. *Id.*, at 489 (emphasis added). We have gone on to add other conditions, which are reflected in the three-part test pronounced in *Miller* v. *California*, 413 U. S. 15, 24 (1973):

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

These standards' immediate purpose and effect—which, it is fair to say, have met with general public acceptance—have been to guarantee the access of all adults to such works of literature, once banned or sought to be banned, as Dreiser's An American Tragedy,[1] Lawrence's Lady Chatterley's Lover,[2] Miller's Tropic of Cancer and Tropic of Capricorn,[3] and Joyce's Ulysses,[4] and to many stage and motion picture productions of genuine dramatic or entertainment value that contain some sexually explicit or even erotic material.

Application of these standards (or, I should say, misapplication of them) has had another effect as well—unintended and most certainly not generally approved. The Dallas ordinance at issue in these cases is not an isolated phenomenon. It is one example of an increasing number of attempts throughout the country, by various means, not to withhold from the public any particular book or performance, but to prevent the erosion of public morality by the increasingly general appearance of what the Dallas ordinance delicately calls "sexually

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[1] Held obscene in *Commonwealth* v. *Friede*, 271 Mass. 318, 171 N. E. 472 (1930).

[2] Held obscene in *People* v. *Dial Press, Inc.*, 182 Misc. 416, 48 N. Y. S. 2d 480 (N. Y. Magis. Ct. 1944).

[3] Held obscene in *United States* v. *Two Obscene Books*, 99 F. Supp. 760 (ND Cal. 1951), aff'd *sub nom. Besig* v. *United States*, 208 F. 2d 142 (CA9 1953).

[4] Unsuccessfully challenged as obscene in *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (SDNY 1933), aff'd, 72 F. 2d 705 (CA2 1934).

oriented businesses." Such businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast. Indeed, as a case we heard last Term demonstrates, they reach even the smallest of communities via telephonic "dial-a-porn." *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115 (1989).

While many communities do not object to such businesses, others do, and have sought to eliminate them. Attempts to do so by focusing upon the individual books, motion pictures, or performances that these businesses market are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression. Communities cannot close down "porn-shops" by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected), just as Congress cannot eliminate specialized "dial-a-porn" telephone services by prohibiting individual messages that are "indecent" but not quite obscene. *Id.*, at 131. Consequently, communities have resorted to a number of other means, including stringent zoning laws, see *e. g.*, *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976) (ordinance adopting unusual zoning technique of requiring sexually oriented businesses to be dispersed rather than concentrated); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986) (ordinance restricting theaters that show "adult" films to locations comprising about 5% of the community's land area, where the Court of Appeals had found no "commercially viable" sites were available), Draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography, see *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46 (1989) (state Racketeer Influenced and Corrupt Organizations (RICO) statute), and the ordinance we have before us today, a licensing scheme purportedly designed to assure that porn-shops are run by a better class of person. Not only are these oblique methods less than entirely effective in eliminating the

perceived evil at which they are directed (viz., the very existence of sexually oriented businesses anywhere in the community that does not want them), but they perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the "chilling" of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as Ulysses.

It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents and should be applied in the present cases. That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene. It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate businesses that hold themselves forth as specializing in such material. Because I think that Dallas could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards.

II

The Dallas ordinance applies to any sexually oriented business, which is defined as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." Dallas City Code § 41A–2(19) (1986). Operators of escort agencies and sexual encounter centers are not before us.

"Adult bookstore or adult video store" is defined, *inter alia*, as a "commercial establishment which as one of its *principal business purposes* offers for sale or rental" books or other printed matter, or films or other visual representations, "which depict or describe 'specified sexual activities' or 'specified anatomical areas.'" § 41A–2(2)(A) (emphasis added).[5] "Adult motion picture theater" is defined as a commercial establishment where films "are *regularly* shown" that depict specified sexual activities or specified anatomical areas. § 41A–2(5) (emphasis added).[6] Other sexually oriented businesses are similarly defined as establishments that "regularly" depict or describe specified sexual activities or specified anatomical areas.[7] "Specified sexual activities" means

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[5] "Adult Bookstore or Adult Video Store means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

"(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe 'specified sexual activities' or 'specified anatomical areas'; or

"(B) instruments, devices, or paraphernalia which are designed for use in connection with 'specified sexual activities.'" Dallas City Code §§ 41A–2(2)(A), (B) (1986).

The regulation of businesses that sell the items described in subsection (B) raises no First Amendment question.

[6] "Adult Motion Picture Theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" § 41A–2(5).

[7] "(3) Adult Cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

"(A) persons who appear in a state of nudity; or

"(B) live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or

"(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'"

"(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

"(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

"(C) masturbation, actual or simulated; or

"(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above." § 41A–2(21).

Finally, "specified anatomical areas" means "human genitals in a state of sexual arousal." § 41A–2(20).

"(6) Adult Theater means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities.'

. . . . .

"(12) Nude Model Studio means any place where a person who appears in a state of nudity or displays 'specified anatomical areas' is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

"(13) Nudity or a State of Nudity means:

"(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

"(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast." § 41A–2.

As to nude model studios, the ordinance further provides as a defense to prosecution that

"a person appearing in a state of nudity did so in a modeling class operated:

"(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

"(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

"(3) in a structure:

"(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

"(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

"(C) where no more than one nude model is on the premises at any one time." § 41A–21(d).

As I shall discuss in greater detail presently, this ordinance is unusual in that it does not apply "work by work." It can reasonably be interpreted to restrict not sales of (or businesses that sell) any particular book, film, or entertainment, but only businesses that *specialize* in books, films, or entertainment of a particular type. That places the obscenity inquiry in a different, and broader, context. Our jurisprudence supports the proposition that even though a particular work of pornography is not obscene under *Miller*, a merchant who concentrates upon the sale of such works is engaged in the business of obscenity, which may be entirely prohibited and hence *(a fortiori)* licensed as required here.

The dispositive case is *Ginzburg* v. *United States*, 383 U. S. 463 (1966). There the defendant was convicted of violating the federal obscenity statute, 18 U. S. C. § 1461, by mailing three publications which our opinion assumed, see 383 U. S., at 465–466, were in and of themselves not obscene. We nonetheless upheld the conviction, because the evidence showed "that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" *Id.*, at 467 (quoting *Roth* v. *United States*, 354 U. S., at 495–496 (Warren, C. J., concurring)). JUSTICE BRENNAN's opinion for the Court concluded that the advertising for the publications, which "stressed the[ir] sexual candor," 383 U. S., at 468, "resolve[d] all ambiguity and doubt" as to the unprotected status of the defendants' activities. *Id.*, at 470.

> "The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. . . . And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the

> circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." *Id.*, at 470–471.

We held one of the three publications in question to be, in the circumstances of its sale, obscene, despite the trial court's finding that only 4 of the 15 articles it contained "predominantly appealed to prurient interest and substantially exceeded community standards of candor," *id.*, at 471; and another to be obscene despite the fact that it previously had been sold by its author to numerous psychiatrists, some of whom testified that they found it useful in their professional practice. We upheld the convictions because the petitioners had "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed." *Id.*, at 472.

In *Memoirs* v. *Attorney General of Massachusetts*, 383 U. S. 413 (1966), decided the same day as *Ginzburg*, we overturned the judgment that a particular book was obscene, but, citing *Ginzburg*, made clear that this did not mean that all circumstances of its distribution would be constitutionally protected. We said:

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. . . . In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and

> the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact . . . that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value." 383 U. S., at 420–421 (footnote omitted).

Ginzburg was decided before our landmark *Miller* decision, but we have consistently applied its holding post-*Miller*. See *Hamling* v. *United States*, 418 U. S. 87, 130 (1974); *Splawn* v. *California*, 431 U. S. 595, 597–599 (1977); *Pinkus* v. *United States*, 436 U. S. 293, 303–304 (1978). Although *Ginzburg* narrowly involved the question whether particular publications were obscene, the foundation for its holding is that "the sordid business of pandering," *Ginzburg*, *supra*, at 467, is constitutionally unprotected—that the sale of material "solely to produce sexual arousal . . . does not escape regulation because [the material] has been dressed up as speech, or in other contexts might be recognized as speech." 383 U. S., at 474, n. 17. But just as *Miller* established some objective criteria concerning what particular publications can be regarded as "appealing to the prurient interest," it impliedly established some objective criteria as to what stock-in-trade can be the raw material (so to speak) of pandering. Giving this limitation full scope, it seems to me that *Ginzburg*, read together with *Miller*, establishes at least the following: The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity. In my view that suffices to sustain the Dallas ordinance.

III

In evaluating the Dallas ordinance under the principles I have described, we must of course give it the benefit of any "limiting construction [that] has been or could be placed" on its text. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). Moreover, we cannot sustain the present facial attack unless the ordinance is "*substantially* overbroad," *id.*, at 615 (emphasis added), that is, "unless it reaches a substantial number of impermissible applications," *New York* v. *Ferber*, 458 U. S. 747, 771 (1982), "judged in relation to the statute's plainly legitimate sweep," *Broadrick*, *supra*, at 615.

Favorably construed, the Dallas ordinance regulates only the business of pandering, as I have defined it above. It should be noted, to begin with, that the depictions, descriptions, and displays that cause any of the businesses before us to qualify as a "sexually oriented business" must be sexually explicit in more than a minor degree. What is at issue here is not the sort of nude photograph that might commonly appear on a so-called "pin-up calendar" or "men's magazine." The mere portrayal of the naked human body does *not* qualify unless (in the definition of adult cabaret, adult theater, and nude model studio) it is featured live. Qualifying depictions and descriptions do not include human genitals, but only human genitals in a state of sexual arousal, the fondling of erogenous zones, and normal or perverted sexual acts.

In addition, in order to qualify for regulation under the ordinance the business that provides such live nudity or such sexually explicit depictions or descriptions must do so "as one of its principal business purposes" (in the case of adult bookstores and adult video stores) or "regularly" (in the case of adult motion picture theaters, adult cabarets, and adult theaters). The adverb "regularly" can mean "constantly, continually, steadily, sustainedly," Roget's International Thesaurus § 135.7, p. 77 (4th ed. 1977), and also "in a . . . methodical way," Webster's Third New International Dictionary 1913 (1981). I think it can reasonably be interpreted

in the present context to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise. Similarly, the phrase "as one of its principal business purposes" can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character.*

All of the establishments at issue, therefore, share the characteristics that they offer (1) live nudity or hardcore sexual material, (2) as a constant, intentional objective of their business. But there is still more. With the single exception of "adult motion picture theater," the descriptions of all the establishments at issue contain some language that suggests a requirement that the business hold itself forth to the public precisely as a place where sexual stimulation of the described sort can be obtained. Surely it would be permissible to interpret the phrase "as one of its principal business purposes" in the definition of "adult bookstore or adult video store" to require such holding forth. A business can hardly have as a principal purpose a line of commerce it does not even promote. Likewise, the portion of the definitions of "adult cabaret" and "adult theater" which requires that they regularly "feature" the described sexual material suggests that it must not merely be there but must be promoted or marketed as such. The definition of nude model studio, while containing no such requirement, is subject to a defense which contains as one of its elements that the structure where the studio is located "has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing." Dallas City Code § 41A–21(d)(3)(A) (1986). Even the definitions of the two categories of enterprises not at issue in this case, "escort agencies" and "sexual encounter centers," contain language that arguably requires a "holding forth" (a "primary business purpose" requirement). Given these indications of the importance of "holding forth" con-

tained in all except one of the definitions, it seems to me very likely—especially if that should be thought necessary to sustain the constitutionality of the measure—that the Dallas ordinance in all its challenged applications would be interpreted to apply only to businesses that not only (1) offer live nudity or hardcore sexual material, (2) as a constant and intentional objective of their business, but also (3) seek to promote it as such. It seems to me that any business that meets these requirements can properly be described as engaged in "the sordid business of pandering," and is not protected by the First Amendment. Indeed, even the first two requirements alone would suffice to sustain the ordinance, since it is most implausible that any enterprise which has as its constant intentional objective the sale of such material does not advertise or promote it as such; if a few such enterprises bent upon commercial failure should exist, they would certainly not be numerous enough to render the ordinance *substantially* overbroad.

The Dallas ordinance's narrow focus distinguishes these cases from *Schad* v. *Mount Ephraim*, 452 U. S. 61 (1981), in which we held unconstitutional a municipal ordinance that prohibited all businesses offering live entertainment, including but not limited to nude dancing. That ordinance was substantially overbroad because, on its face, it prohibited "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Id.*, at 65. The Dallas ordinance, however, targets only businesses engaged in unprotected activity.

Even if it were possible to conceive of a business that could meet the above-described qualifications and yet be engaged in First Amendment activities rather than pandering, we do not invalidate statutes as overbroad on the basis of imagination alone. We have always held that we will not apply that "strong medicine" unless the overbreadth is both "real" and "substantial." *Broadrick* v. *Oklahoma*, *supra*, at 613, 615. I think we must sustain the current ordinance just as we sustained the statute at issue in *New York* v. *Ferber*, *supra*,

which forbade the distribution of materials depicting minors in a "sexual performance." The state court had applied overbreadth analysis because of its "understandabl[e] concer[n] that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." *Id.*, at 773. We said:

> "[W]e seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.' Under these circumstances, § 263.15 is 'not substantially overbroad and . . . whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' *Broadrick* v. *Oklahoma*, 413 U. S., at 615–616." *Id.*, at 773–774.

The legitimate reach of the Dallas ordinance "dwarfs its arguably impermissible applications." *Id.*, at 773.

To reject the present facial attack upon the ordinance is not, of course, to deprive someone who is not engaged in pandering and who is somehow caught within its provisions (if that could possibly occur) from asserting his First Amendment rights. But that eventuality is so improbable, it seems to me, that no substantial quantity of First Amendment activity is anticipatorily "chilled." The Constitution is adequately safeguarded by conducting further review of this reasonable ordinance as it is applied.

JUSTICE O'CONNOR's opinion correctly notes that respondents conceded that the *materials* sold are protected by the First Amendment. *Ante*, at 224. But they did not concede that the activity of pandering at which the Dallas ordinance is directed is constitutionally protected. They did not, to be

sure, specifically argue *Ginzburg*, or suggest the complete proscribability of these businesses as a basis for sustaining their manner of licensing them. But we have often sustained judgments on grounds not argued—particularly in the area of obscenity law, where our jurisprudence has been, let us say, not entirely predictable. In *Ginzburg* itself, for example, the United States did not argue that the convictions could be upheld on the pandering theory the Court adopted, but only that the materials sold were obscene under *Roth*. Brief for United States in *Ginzburg* v. *United States*, O. T. 1965, No. 42, p. 18. In *Mishkin* v. *New York*, 383 U. S. 502 (1966), one of the companion cases to *Ginzburg*, the State of New York defended the convictions under *Roth* and explicitly disagreed with those commentators who would determine obscenity by looking to the "intent of the disseminator," rather than "character of the material." Brief for Appellee in *Mishkin* v. *New York*, O. T. 1965, No. 49, p. 45, and n. See also Brief for Appellee in *Memoirs* v. *Attorney General of Massachusetts*, O. T. 1965, No. 368, p. 17 (defending convictions under *Roth* and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962)). Likewise in *Roth*, where we held that the test for obscenity was appeal to prurient interest, 354 U. S., at 489, the United States had argued that obscenity was established if the material "constitutes a present threat to the morals of the average person in the community." Brief for United States in *Roth* v. *United States*, O. T. 1956, No. 582, p. 100. And no one argued that the *Miller* Court should abandon the "utterly without redeeming social value" test of the *Memoirs* plurality, but the Court did so nevertheless. Compare 413 U. S., at 24–25, with Brief for Appellee in *Miller* v. *California*, O. T. 1972, No. 70–73, pp. 26–27.

* * *

The mode of analysis I have suggested is different from the rigid test for obscenity that we apply to the determination whether a particular book, film, or performance can be banned. The regulation here is not directed to particular

works or performance, but to their concentration, and the constitutional analysis should be adjusted accordingly. What JUSTICE STEVENS wrote for the plurality in *American Mini Theatres* is applicable here as well: "[W]e learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." 427 U. S., at 65. The prohibition of concentrated pornography here is analogous to the prohibition we sustained in *American Mini Theatres*. There we upheld ordinances that prohibited the concentration of sexually oriented businesses, each of which (we assumed) purveyed material that was not constitutionally proscribable. Here I would uphold an ordinance that regulates the concentration of sexually oriented material in a single business.

The basis of decision I have described seems to me the proper means, in Chief Justice Warren's words, "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (dissenting opinion). It entails no risk of suppressing even a single work of science, literature, or art—or, for that matter, even a single work of pornography. Indeed, I fully believe that in the long run it will expand rather than constrict the scope of permitted expression, because it will eliminate the incentive to use, as a means of preventing commercial activity patently objectionable to large segments of our society, methods that constrict unobjectionable activity as well.

For the reasons stated, I respectfully dissent.

SPALLONE *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–854. Argued October 2, 1989—Decided January 10, 1990*

In 1985, in a suit brought by the United States, the city of Yonkers and its community development agency were held liable for intentionally enhancing segregation in housing in violation of Title VIII of the Civil Rights Act of 1968 and the Equal Protection Clause of the Fourteenth Amendment. In early 1986, the District Court entered its remedial order, which enjoined the two named defendants and their officers, agents, and others acting in concert with them from discriminating and required the city to take extensive affirmative steps to disperse public housing throughout Yonkers. Pending appeal of the liability and remedial orders, the city failed and refused to take various of the required steps. Shortly after the Court of Appeals affirmed the District Court's judgment in all respects, the parties agreed to a consent decree setting forth certain actions which the city would take to implement the remedial order, including the adoption, within 90 days, of a legislative package known as the Affordable Housing Ordinance. The decree was approved in a 5-to-2 vote by the city council—which is vested with all of the city's legislative powers—and entered by the District Court as a consent judgment in January 1988. When the city again delayed action, the District Court entered an order on July 26, 1988, requiring the city to enact the ordinance and providing that failure to do so would result in contempt citations, escalating daily fines for the city, and daily fines and imprisonment for recalcitrant individual councilmembers. After a resolution of intent to adopt the ordinance was defeated by a 4-to-3 council vote, petitioner individual councilmembers constituting the majority, the District Court held the city and petitioners in contempt and imposed the sanctions set forth in the July 26 order. The Court of Appeals affirmed, rejecting, *inter alia*, petitioners' argument that the District Court had abused its discretion in sanctioning them. After this Court stayed the imposition of sanctions against the individual petitioners, but denied the city's request for a stay, the city council enacted the ordinance on September 9, 1988, in the face of daily fines approaching $1 million.

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*Together with No. 88–856, *Chema* v. *United States et al.*, and No. 88–870, *Longo et al.* v. *United States et al.*, also on certiorari to the same court.

Held: In the circumstances of this case, the portion of the District Court's July 26 order imposing contempt sanctions against petitioner individual councilmembers if they failed to vote in favor of the ordinance was an abuse of discretion under traditional equitable principles. Petitioners were never parties to the action, nor were they found to be individually liable for any of the violations upon which the remedial order was based. Although the injunctive portion of that order was directed not only to the city but also to its officers and others acting in concert to discriminate, the remaining parts of the order requiring affirmative steps were directed only to the city. It was the city, in fact, which capitulated in the present phase of the case, and there was a reasonable probability that sanctions against the city alone would have achieved the desired result. The city's arguments against imposing sanctions on it pointed out the sort of pressure such sanctions would place on the city, and only eight months earlier, the District Court had secured compliance with an important remedial order through the threat of bankrupting fines against the city alone. While this Court's Speech or Debate Clause and federal common law of legislative immunity cases do not control the question whether local legislators such as petitioners should be immune from contempt sanctions, some of the considerations underlying the immunity doctrine must inform the District Court's exercise of discretion, particularly the theme that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. There are significant differences between fining the city and imposing sanctions on individual legislators, since the latter course causes legislators to vote, not with a view to the wishes of their constituents or to the fiscal solvency of the city, but with a view solely to their own personal monetary interest, and thereby effects a much greater perversion of the normal legislative process. Thus, in view of the fact that holding elected officials in contempt for the manner in which they vote is "extraordinary," as the District Court recognized, that court should have proceeded with sanctions first against the city alone in order to secure compliance with the remedial order. Only if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions against petitioners even have been considered. This limitation accords with the doctrine that, in selecting contempt sanctions, a court must exercise the least possible power adequate to the end proposed. Pp. 273–280.

856 F. 2d 444, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 281.

James D. Harmon, Jr., argued the cause for petitioners in all cases and filed briefs for petitioner in No. 88–856. With him on the briefs were *Barry G. Saretsky*, *Martin S. Kaufman*, *Michael J. Eng*, and *Aaron F. Fishbein*. *Anthony J. Mercorella*, *James L. Fischer*, *Vincent R. Fontana*, and *Vincent R. Cappucci* filed briefs for petitioner in No. 88–854. *William Greenberg* and *Joseph Maria* filed briefs for petitioners in No. 88–870. *Rex E. Lee*, *Carter G. Phillips*, *Mark D. Hopson*, *Stanley R. Strauss*, *Michael W. Sculnick*, and *Paul W. Pickelle* filed a brief for the city of Yonkers, respondent under this Court's Rule 12.4, in support of petitioners.

Solicitor General Starr argued the cause for respondents in all cases. With him on the brief for the United States were *Acting Assistant Attorney General Turner*, *Deputy Solicitor General Shapiro*, *Michael R. Lazerwitz*, *David K. Flynn*, and *Linda F. Thome*. *Grover G. Hankins* filed a brief for respondents Yonkers Branch—National Association for the Advancement of Colored People et al.†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This action is the most recent episode of a lengthy lawsuit in which the city of Yonkers was held liable for intentionally enhancing racial segregation in housing in Yonkers. The issue here is whether it was a proper exercise of judicial power for the District Court to hold petitioners, four Yonkers city councilmembers, in contempt for refusing to vote in favor of legislation implementing a consent decree earlier approved by the city. We hold that in the circumstances of this action the District Court abused its discretion.

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†*Steven R. Shapiro*, *Christopher A. Hansen*, *John A. Powell*, *Helen Hershkoff*, and *Arthur N. Eisenberg* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Henry Mark Holzer, *Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Yonkers Federation, Inc., as *amicus curiae*.

I

In 1980, the United States filed a complaint alleging, *inter alia*, that the two named defendants—the city of Yonkers and the Yonkers Community Development Agency—had intentionally engaged in a pattern and practice of housing discrimination, in violation of Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, as amended, 42 U. S. C. §3601 *et seq.* (1982 ed.), and the Equal Protection Clause of the Fourteenth Amendment. The Government and plaintiff-intervenor National Association for the Advancement of Colored People (NAACP) asserted that the city had, over a period of three decades, selected sites for subsidized housing in order to perpetuate residential racial segregation. The plaintiffs' theory was that the city had equated subsidized housing for families with minority housing, and thus disproportionately restricted new family housing projects to areas of the city—particularly southwest Yonkers—already predominately populated by minorities.

The District Court found the two named defendants liable, concluding that the segregative effect of the city's actions had been "consistent and extreme," and that "the desire to preserve existing patterns of segregation ha[d] been a significant factor in the sustained community opposition to subsidized housing in East Yonkers and other overwhelmingly white areas of the City." *United States* v. *Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1369–1371 (SDNY 1985). The District Court in its remedial decree enjoined "the City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them" from, *inter alia*, intentionally promoting racial residential segregation in Yonkers, taking any action intended to deny or make unavailable housing to any person on account of race or national origin, and from blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin. *United States* v. *Yonkers Bd. of*

Ed., 635 F. Supp. 1577 (SDNY 1986). Other parts of the remedial order were directed only to the city. They required affirmative steps to disperse public housing throughout Yonkers. Part IV of the order noted that the city previously had committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving 1983 Community Development Block Grant funds from the Federal Government, but had failed to do so. Consequently, it required the city to designate sites for 200 units of public housing in east Yonkers, and to submit to the Department of Housing and Urban Development an acceptable Housing Assistance Plan for 1984–1985 and other documentation. *Id.*, at 1580–1581. Part VI directed the city to develop by November 1986 a long-term plan "for the creation of additional subsidized family housing units . . . in existing residential areas in east or northwest Yonkers." *Id.*, at 1582. The court did not mandate specific details of the plan such as how many subsidized units must be developed, where they should be constructed, or how the city should provide for the units.

Under the Charter of the city of Yonkers all legislative powers are vested in the city council, which consists of an elected mayor and six councilmembers, including petitioners. The city, for all practical purposes, therefore, acts through the city council when it comes to the enactment of legislation. Pending appeal of the District Court's liability and remedial orders, however, the city did not comply with Parts IV and VI of the remedial order. The city failed to propose sites for the public housing, and in November 1986, informed the District Court that it would not present a long-term plan in compliance with Part VI. The United States and the NAACP then moved for an adjudication of civil contempt and the imposition of coercive sanctions, but the District Court declined to take that action. Instead, it secured an agreement from the city to appoint an outside housing adviser to identify sites for the 200 units of public housing and to draft a long-term plan.

In December 1987, the Court of Appeals for the Second Circuit affirmed the District Court's judgment in all respects, *United States* v. *Yonkers Bd. of Ed.*, 837 F. 2d 1181, and we subsequently denied certiorari, *Yonkers Bd. of Ed.* v. *United States*, 486 U. S. 1055 (1988). Shortly after the Court of Appeals' decision, in January 1988, the parties agreed to a consent decree that set forth "certain actions which the City of Yonkers [would] take in connection with a consensual implementation of Parts IV and VI" of the housing remedy order. App. 216. The decree was approved by the city council in a 5-to-2 vote (petitioners Spallone and Chema voting no), and entered by the District Court as a consent judgment on January 28, 1988. Sections 12 through 18 of the decree established the framework for the long-term plan and are the underlying bases for the contempt orders at issue in this action.[1] Perhaps most significant was § 17, in which the city agreed to adopt, within 90 days, legislation conditioning the construction of all multifamily housing on the inclusion of at least 20 percent assisted units, granting tax abatements and density bonuses to developers, and providing for zoning changes to allow the placement of housing developments.[2]

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[1] Sections 1 through 11 of the consent decree set forth actions that the city agreed to take in connection with the public housing obligations imposed by Part IV of the housing remedy order. As the Solicitor General emphasized at oral argument, neither those sections of the decree nor Part IV of the remedy order is at issue in this action.

[2] The full text of § 17 provides that "[t]he City agrees to adopt, among other things, legislation (a) conditioning the construction of all multifamily housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the In-

For several more months, however, the city continued to delay action toward implementing the long-term plan. The city was loath to enact the plan because it wished to exhaust its remedies on appeal, but it had not obtained any stay of the District Court's order. As a result of the city's intransigence, the United States and the NAACP moved the court for the entry of a Long Term Plan Order based on a draft that had been prepared by the city's lawyers during negotiations between January and April 1988. On June 13, following a hearing and changes in the draft, the District Court entered the Long Term Plan Order, which provided greater detail for the legislation prescribed by § 17 of the decree. After several weeks of further delay the court held a hearing on July 26, 1988, and entered an order requiring the city of Yonkers to enact, on or before August 1, 1988, the "legislative package" described in a section of the earlier consent decree; the second paragraph provided:

> "It is further ORDERED that, in the event the City of Yonkers fails to enact the legislative package on or before August 1, 1988, the City of Yonkers shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why it should not be held in contempt, and each individual City Council member shall be required to show cause at a hearing before this court at 10:00 a.m. on August 2, 1988, why he should not be held in contempt." App. 398.

Further provisions of the order specified escalating daily amounts of fines in the event of contempt, and provided that if the legislation were not enacted before August 10, 1988, any councilmember who remained in contempt should be committed to the custody of the United States Marshal for

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dustrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the 'Mandated Incentives'). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree."

imprisonment. The specified daily fines for the city were $100 for the first day, to be doubled for each consecutive day of noncompliance; the specified daily fine for members of the city council was $500 per day.

Notwithstanding the threat of substantial sanctions, on August 1 the city council defeated a resolution of intent to adopt the legislative package, known as the Affordable Housing Ordinance, by a vote of 4 to 3 (petitioners constituting the majority). On August 2, the District Court held a hearing to afford the city and the councilmembers an opportunity to show cause why they should not be adjudicated in contempt. It rejected the city's arguments, held the city in contempt, and imposed the coercive sanctions set forth in the July 26 order. After questioning the individual councilmembers as to the reasons for their negative votes, the court also held each of the petitioners in contempt and imposed sanctions. It refused to accept the contention that the proper subject of the contempt sanctions was the city of Yonkers alone, see *id.*, at 461, and overruled the objection that the court lacked the power to direct councilmembers how to vote, because in light of the consent judgment, it thought the city council's adoption of the Affordable Housing Ordinance would be "in the nature of a ministerial act." *Id.*, at 460.

On August 9, the Court of Appeals stayed the contempt sanctions pending appeal. Shortly thereafter, the court affirmed the adjudications of contempt against both the city and the councilmembers, but limited the fines against the city so that they would not exceed $1 million per day. *United States* v. *Yonkers*, 856 F. 2d 444 (CA2 1988). The Court of Appeals refused to accept the councilmembers' argument that the District Court abused its discretion in selecting its method of enforcing the consent judgment. While recognizing that "a court is obliged to use the 'least possible power adequate to the end proposed,'" *id.* at 454 (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821)), it concluded that the District Court's choice of coercive contempt sanctions against

the councilmembers could not be an abuse of discretion, because the city council had approved the consent judgment and thereby agreed to implement the legislation described in § 17 of the decree. The Court of Appeals also rejected petitioners' invocation of the federal common law of legislative immunity, see *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), concluding that "[w]hatever the scope of local legislators' immunity, it does not insulate them from compliance with a consent judgment to which their city has agreed and which has been approved by their legislative body." 856 F. 2d, at 457. Finally, the court held that even if "the act of voting has sufficient expressive content to be accorded some First Amendment protection as symbolic speech, the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred." *Ibid.*

Both the city and the councilmembers requested this Court to stay imposition of sanctions pending filing and disposition of petitions for certiorari. We granted a stay as to petitioners, but denied the city's request. 487 U. S. 1251 (1988). With the city's contempt sanction approaching $1 million per day, the city council finally enacted the Affordable Housing Ordinance on September 9, 1988, by a vote of 5 to 2, petitioners Spallone and Fagan voting no. Because the contempt orders raise important issues about the appropriate exercise of the federal judicial power against individual legislators, we granted certiorari, 489 U. S. 1064 (1989), and now reverse.

II

The issue before us is relatively narrow. There can be no question about the liability of the city of Yonkers for racial discrimination: the District Court imposed such liability on the city, its decision was affirmed in all respects by the Court of Appeals, and we denied certiorari. Nor do we have before us any question as to the District Court's remedial order; the Court of Appeals found that it was within the bounds of

proper discretion, *United States* v. *Yonkers Bd. of Ed.*, 837 F. 2d, at 1236, and we denied certiorari. Our focus, then, is only on the District Court's order of July 26 imposing contempt sanctions on the individual petitioners if they failed to vote in favor of the ordinance in question.

Petitioners contend that the District Court's order violates their rights to freedom of speech under the First Amendment, and they also contend that they are entitled as legislators to absolute immunity for actions taken in discharge of their legislative responsibilities. We find it unnecessary to reach either of these questions, because we conclude that the portion of the District Court's order of July 26 imposing contempt sanctions against petitioners if they failed to vote in favor of the court-proposed ordinance was an abuse of discretion under traditional equitable principles.

Before discussing the principles informing our conclusion, it is important to note the posture of the case before the District Court at the time it entered the order in question. Petitioners were members of the city council of the city of Yonkers, and if the city were to enact legislation it would have to be by their doing. But petitioners had never been made parties to the action, and the District Court's order imposed liability only on the named defendants in the action—the city of Yonkers and the Yonkers Community Development Agency. The remedial order had enjoined the two named defendants, and—in the traditional language of a prohibitory decree—officers, agents, and others acting in concert with them from discriminating on the basis of race in connection with the furnishing of housing and from intentionally promoting racial residential segregation in Yonkers. The order had gone on to require extensive affirmative steps to disperse public housing throughout Yonkers, but those portions of the order were directed only against the city. There was no evidence taken at the hearing of July 26, 1988, and the court's order of that date did not make petitioners parties to the action.

From the time of the entry of the remedial order in early 1986 until this Court denied certiorari in the case involving the merits of the litigation in June 1988, the city backed and filled in response to the court's efforts to obtain compliance with the housing portions of the decree. It agreed to a consent decree and then sought unsuccessfully to have the decree vacated. During this period of time the city had a certain amount of bargaining power simply by virtue of the length of time it took the appellate process to run its course. Although the judgment against the city was not stayed, the District Court was sensibly interested in moving as rapidly as possible toward the construction of housing which would satisfy the remedial order, rather than simply forcing the city to enact legislation. The District Court realized that for such construction to begin pursuant to the remedial decree, not only must the city comply, but potential builders and developers must be willing to put up money for the construction. To the extent that the city took action voluntarily, without threatening to rescind the action if the District Court's decision were reversed, construction could proceed before the appellate process had run its course.

All of this changed, however, in June 1988, when this Court denied certiorari and the District Court's orders on the merits of the case became final. On July 26, the court heard the comments of counsel for the parties and entered the order upon which the contempt sanctions against the individual councilmembers were based.

At this stage of the case, the court contemplated various methods by which to ensure compliance with its remedial orders. It considered proceeding under Federal Rule of Civil Procedure 70, whereby a party who is ordered to perform an act but fails to do so is nonetheless "deemed" to have performed it. It also suggested the possible transference of functions relating to housing from the city council to a court-appointed affordable housing commission; the city opposed this method. Finally, it considered proceeding by way of

sanctions for contempt to procure the enactment of the ordinance.

In selecting a means to enforce the consent judgment, the District Court was entitled to rely on the axiom that "courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U. S. 364, 370 (1966). When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers. See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 15 (1971). But while "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited." *Whitcomb* v. *Chavis*, 403 U. S. 124, 161 (1971). "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken* v. *Bradley*, 433 U. S. 267, 280–281 (1977). And the use of the contempt power places an additional limitation on a district court's discretion, for as the Court of Appeals recognized, "in selecting contempt sanctions, a court is obliged to use the 'least possible power adequate to the end proposed.'" 856 F. 2d, at 454 (quoting *Anderson* v. *Dunn*, 6 Wheat., at 231).

Given that the city had entered a consent judgment committing itself to enact legislation implementing the long-term plan, we certainly cannot say it was an abuse of discretion for the District Court to have chosen contempt sanctions against the city, as opposed to petitioners, as a means of ensuring compliance. The city, as we have noted, was a party to the action from the beginning, had been found liable for numerous statutory and constitutional violations, and had been subjected to various elaborate remedial decrees which had been upheld on appeal. Petitioners, the individual city councilmembers, on the other hand, were not parties to the action, and they had not been found individually liable for any of the violations upon which the remedial decree was based. Although the injunctive portion of that decree was directed

not only to the city but to "its officers, agents, employees, successors and all persons in active concert or participation with any of them," App. 20, the remaining parts of the decree ordering affirmative steps were directed only to the city.[3]

It was the city, in fact, which capitulated. After the Court of Appeals had briefly stayed the imposition of sanctions in August, and we granted a stay as to petitioners but denied it to the city in September, the city council on September 9, 1988, finally enacted the Affordable Housing Ordinance by a vote of 5 to 2. While the District Court could not have been sure in late July that this would be the result, the city's arguments against imposing sanctions on it pointed out the sort of pressure that such sanctions would place on the city. After just two weeks of fines, the city's emergency financial plan required it to curtail sanitation services (resulting in uncollected garbage), eliminate part-time school crossing guards, close all public libraries and parks, and lay off approximately 447 employees. In the ensuing four weeks, the city would have been forced to lay off another 1,100 city employees. See N. Y. Times, Sept. 8, 1988, p. A1, col. 4; N. Y. Times, Sept. 9, 1988, p. A1, col. 4.

Only eight months earlier, the District Court had secured compliance with an important remedial order through the threat of bankrupting fines against the city alone. After the city had delayed for several months the adoption of a 1987–1988 Housing Assistance Plan (HAP) vital to the public housing required by Part IV of the remedial order, the court ordered the city to carry out its obligation within two days. App. 176. The court set a schedule of contempt fines equal to that assessed for violation of the orders in this litigation and recognized that the consequence would be imminent bankruptcy for the city. *Id.*, at 177–179. Later *the same day*, the city council agreed to support a resolution putting in place an effective HAP and reaffirming the commitment of

[3] The Government's statement to the contrary in its brief, Brief for United States 23–24, is in error.

Yonkers to accept funds to build the 200 units of public housing mandated by Part IV of the remedial order. *Id.*, at 183.[4]

The nub of the matter, then, is whether in the light of the reasonable probability that sanctions against the city would accomplish the desired result, it was within the court's discretion to impose sanctions on petitioners as well under the circumstances of this case.

In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), we held that state legislators were absolutely privileged in their legislative acts in an action against them for damages. We applied this same doctrine of legislative immunity to regional legislatures in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404–405 (1979), and to actions for both damages and injunctive relief in *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 731–734 (1980). The holdings in these cases do not control the question whether local legislators such as petitioners should be immune from contempt sanctions imposed for failure to vote in favor of a particular legislative bill. But some of the same considerations on which the immunity doctrine is based must inform the District Court's exercise of its discretion in a case such as this. "Freedom of speech and action in the legislature," we observed, "was taken as a matter of course by those who sev-

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[4] The Government distinguishes the instant sanctions from those threatened in January 1988, because in this litigation the city and the city council had indicated by the defeat of a resolution proposed by the court that it "would not 'voluntarily adopt the legislation contemplated by the [court's orders].'" *Id.*, at 45 (quoting City of Yonkers Memorandum of Law in Opposition to Plaintiffs' Proposed Contempt Order; see App. 351). Before the court threatened sanctions for refusal to adopt the 1987–1988 HAP, however, the city council had twice tabled an initiative to enact the HAP, *id.*, at 173, and the court previously had been forced to "deem" HAP's to have been submitted for two previous years. *Id.*, at 174; Brief for United States 5, n. 7. Suffice it to say that the council's conduct with regard to the HAP hardly suggested a willingness to comply "voluntarily."

ered the Colonies from the Crown and founded our Nation." *Tenney*, *supra*, at 372.

In perhaps the earliest American case to consider the import of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that "the privilege secured by it is not so much the privilege of the house as an organized body, *as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house.* For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people . . . ." *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. *Lake Country Estates*, *supra*, at 404–405; *Tenney*, *supra*, at 377. The District Court was quite sensitive to this fact; it observed:

> "I know of no parallel for a court to say to an elected official, 'You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.' I find that extraordinary." App. 433.

Sanctions directed against the city for failure to take actions such as those required by the consent decree coerce the city legislators and, of course, restrict the freedom of those legislators to act in accordance with their current view of the city's best interests. But we believe there are significant differences between the two types of fines. The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests. Even though an individual legislator took

the extreme position—or felt that his constituents took the extreme position—that even a huge fine against the city was preferable to enacting the Affordable Housing Ordinance, monetary sanctions against him individually would motivate him to vote to enact the ordinance simply because he did not want to be out of pocket financially. Such fines thus encourage legislators, in effect, to declare that they favor an ordinance not in order to avoid bankrupting the city for which they legislate, but in order to avoid bankrupting themselves.

This sort of individual sanction effects a much greater perversion of the normal legislative process than does the imposition of sanctions on the city for the failure of these same legislators to enact an ordinance. In that case, the legislator is only encouraged to vote in favor of an ordinance that he would not otherwise favor by reason of the adverse sanctions imposed on the city. A councilman who felt that his constituents would rather have the city enact the Affordable Housing Ordinance than pay a "bankrupting fine" would be motivated to vote in favor of such an ordinance because the sanctions were a threat to the fiscal solvency of the city for whose welfare he was in part responsible. This is the sort of calculus in which legislators engage regularly.

We hold that the District Court, in view of the "extraordinary" nature of the imposition of sanctions against the individual councilmembers, should have proceeded with such contempt sanctions first against the city alone in order to secure compliance with the remedial order. Only if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions against petitioners even have been considered. "This limitation accords with the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.' *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821); *In re Michael*, 326 U. S. 224, 227 (1945)." *Shillitani* v. *United States*, 384 U. S., at 371.

The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I understand and appreciate the Court's concern about the District Court's decision to impose contempt sanctions against local officials acting in a legislative capacity. We must all hope that no court will ever again face the open and sustained official defiance of established constitutional values and valid judicial orders that prompted Judge Sand's invocation of the contempt power in this manner. But I firmly believe that its availability for such use, in extreme circumstances, is essential. As the District Court was aware:

> "The issues transcend Yonkers. They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails. The issues before the court this morning are no less significant than that." App. 177.

The Court today recognizes that it was appropriate for the District Court to hold in contempt and fine the city of Yonkers to encourage the city councilmembers to comply with their prior promise to redress the city's history of racial segregation. Yet the Court also reprimands the District Court for simultaneously fining the individual councilmembers whose continuing defiance was the true source of the impasse, holding that personal sanctions should have been considered only after the city sanctions first proved fruitless.

I cannot accept this parsimonious view of the District Court's discretion to wield the power of contempt. Judge Sand's intimate contact for many years with the recalcitrant councilmembers and his familiarity with the city's political climate gave him special insight into the best way to coerce compliance when all cooperative efforts had failed. From

our detached vantage point, we can hardly judge as well as he which coercive sanctions or combination thereof were most likely to work quickly and least disruptively. Because the Court's *ex post* rationalization of what Judge Sand should have done fails to do justice either to the facts of this case or the art of judging, I must dissent.

I

For the past four decades, Yonkers officials have relentlessly preserved and exacerbated racial residential segregation throughout the city. The population of black and Hispanic residents grew from 3% in 1940 to 19% in 1980. Over 80% now reside in Yonkers' southwest section, and this channeling did not happen by chance. Starting in 1949, city officials initiated a series of low-income housing projects designed to serve the housing needs of this growing population; but city officials concentrated 96.6% of these projects in or adjacent to the southwest section, preserving east and northwest Yonkers as overwhelmingly white communities.[1] At the same time, city officials manipulated the public school

[1] According to the 1980 census, only 6% of the residents outside of southwest Yonkers were minorities, and they were largely concentrated in two small neighborhoods. One northwest neighborhood had a minority population of 29% and abutted a southwest tract comprised of over 50% minorities. The second neighborhood, located in east Yonkers, was Runyon Heights. This neighborhood was founded early in this century on a large tract of land by a state senator who regularly brought busloads of blacks from Harlem for picnics at which he auctioned off parcels of land to them. Runyon Heights is bounded to the north by a white neighborhood called Homefield. The original deeds for many Homefield properties contained restrictive covenants prohibiting the sale of such properties to minorities, and as Runyon Heights developed, the Homefield Neighborhood Association purchased and maintained a 4-foot strip of land as a barrier between the streets of the two neighborhoods. Most Runyon Heights streets terminate in a dead end just below this strip, essentially sealing off the minority community from the surrounding white neighborhood.

One of the only two low-income housing developments located outside of southwest Yonkers was placed in Runyon Heights. The other housed only senior citizens, predominantly whites.

system—*e. g.*, altering attendance zone boundaries, opening and closing schools, assigning faculty and administrators to schools based on race—creating and maintaining racially segregated schools, with the predominantly minority schools being educationally inferior.

Respondent United States brought suit in the United States District Court for the Southern District of New York to challenge these racially discriminatory practices, and respondent NAACP intervened. After a 14-month trial, Judge Sand took 277 pages to detail the myriad of racially motivated government acts and omissions and held the city of Yonkers and various agencies liable for intentional racial segregation in both housing and public education. *United States* v. *Yonkers Board of Education*, 624 F. Supp. 1276 (1985). With respect to the housing issue, Judge Sand found a "remarkably consistent and extreme" pattern of segregationist efforts "characterized by a common theme: racially influenced opposition to subsidized housing in certain [predominantly white] areas of the City, and acquiescence in that opposition by City officials." *Id.*, at 1369, 1370. Because "the operation of the City's ward system provided strong incentive for individual councilmen to defer to the views of their constituents on subsidized housing, and for the Council as a whole to defer to the views of the ward councilman," *id.*, at 1369, the council routinely designed its housing policies to give effect to its white constituents' ardent insistence on residential purity. Judge Sand summed up his extensive factual findings as follows:

> "In short, we find the unusual scope and complexity of plaintiffs' contentions to be matched by evidence of discriminatory intent that is itself unusual in its strength and abundance. Having considered the evidence in its entirety, this Court is fully persuaded that the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in

response to constituent pressures to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation. This pattern of discriminatory actions is evident as early as the first selection of sites for public housing under the National Housing Act of 1949, and it has continued, unbroken, through . . . 1982." *Id.*, at 1373.

After conducting a 6-day hearing to determine appropriate remedies, Judge Sand issued on May 28, 1986, a Housing Remedy Order that required the city to facilitate the development of public and subsidized housing outside southwest Yonkers. *United States* v. *Yonkers Board of Education*, 635 F. Supp. 1577 (SDNY). The order required construction of 200 units of public housing; the city was required to propose sites for 140 units within 30 days and sites for the remaining 60 units within 90 days. The order also required the city to provide additional units of subsidized housing in east or northwest Yonkers, leaving the city broad discretion to choose the precise number and location of these subsidized units. The city was given aproximately six months to present for court approval a detailed long-term plan specifying, among other things, the number of subsidized units to be constructed or acquired, their location, and the rent levels or degree of subsidization.

Although these requirements were not stayed pending appeal, the city immediately defaulted on its obligations. Officials proposed no sites for the 200 units of public housing within the specified 30 and 90 days, and they failed to present a long-term plan for subsidized housing within six months. Indeed, city officials pointedly told Judge Sand that they would not comply with these aspects of the Housing Remedy Order. Respondents moved for an adjudication of civil contempt and the imposition of coercive sanctions. Judge Sand denied this motion, instead negotiating with the city for appointment of an outside housing adviser to help the city iden-

tify sites for the 200 units of public housing and to begin drafting a proposed long-term plan for the additional subsidized units.

The adviser recommended eight available sites for housing. The city council responded by passing a resolution conditioning its support for the adviser's general plan on a number of terms drastically limiting the scope and efficacy of the remedy, including (1) staying all construction until the city had exhausted all appeals; (2) reducing the units of subsidized housing from 800 to 200; and (3) allowing local residential committees to screen all applicants for public housing. The city then proposed that the Housing Remedy Order be modified in accordance with the city council's resolution. Judge Sand offered to consider the city's motion, explaining that he believed it appropriate to implement a remedy "embody[ing] to the maximum possible extent consistent with the purposes of the housing remedy order the views of the community itself." App. 87. To ensure that the city's proposal was not merely intended as a dilatory tactic, however, Judge Sand asked the city council to demonstrate its good faith by taking the preliminary steps necessary to obtain control of the potential housing sites identified by the housing adviser by, for example, passing a resolution requesting a neighboring county to permit the city to use identified county sites for housing.

But the city council neither passed the suggested resolution nor took any other action to obtain the proposed sites. The city's attorney informed Judge Sand that the city was still trying to devise a politically acceptable plan, but the attorney could not assure the judge that the plan, or any other action by the city council, would be forthcoming. During the remainder of 1987, the parties bickered over the selection of various sites to be used for construction of the 200 promised public units, and city officials still refused to propose a long-term plan.

On December 28, 1987, the Court of Appeals for the Second Circuit affirmed both Judge Sand's liability and remedy rulings with respect to both the housing discrimination and school segregation claims. In so doing, the court rejected as "frivolous" the city's challenge to Judge Sand's finding that the city officials' subsidized housing decisions were made with a "segregative purpose." *United States* v. *Yonkers Board of Education*, 837 F. 2d 1181, 1222, cert. denied, 486 U. S. 1055 (1988). The next month, the city indicated to Judge Sand that the parties had started negotiating an agreement designed to implement the Housing Remedy Order. On January 25, 1988, the parties informed the court that they had reached an agreement in principle. The Yonkers City Council approved the agreement by a 5-to-2 vote on January 27, with petitioners Chema and Spallone dissenting. Judge Sand entered the agreement, the "First Remedial Consent Decree in Equity" (Consent Decree), as a consent judgment the next day. The Consent Decree reiterated the city's pledge to build the 200 required public units, identified seven sites, and committed the city to a specific construction timetable. The city also promised to forgo any further judicial review of this aspect of the remedial order.

The Consent Decree also set a goal of 800 units of subsidized housing to be developed over four years in conjunction with market-rate housing developments, and it committed the city to specific actions needed to encourage private developers to build such housing. In §17 of the Consent Decree, the city expressly agreed to adopt legislation (referred to as the Affordable Housing Ordinance) conditioning the future construction of multifamily housing in Yonkers on the inclusion of at least 20% subsidized units, and providing for such private development incentives as zoning changes, tax abatements, and density bonuses. The city expressly agreed to enact this legislation within 90 days after entry of the Consent Decree. Section 18 of the Consent Decree provided that the city would negotiate further to resolve certain "sub-

sidiary issues" with respect to the long-term plan and would submit a second consent decree to be entered within three weeks.

Rather than abide by the terms of the Consent Decree, the city councilmembers sought almost immediately to disavow it. First, citing intense community opposition to the plan, the city moved to delete the provision forgoing judicial review of its obligation to build the 200 units, and the city even offered to return approximately $30 million in grants previously provided by the Federal Government to fund its low-income housing programs if this Court ultimately were to set aside the city's duty to encourage the long-term development of subsidized housing in white neighborhoods. After Judge Sand denied the motion, the city promptly informed him that it would not enact the legislation it had earlier approved in §17 of the Decree and it was "not interested" in completing negotiations on the long-term plan as required by §18. Finally, the city moved to vacate the Consent Decree *in toto*, arguing that the city's failure to secure permission of the Archdiocese of New York for using some seminary property as a housing site constituted a "mutual mistake" invalidating the entire agreement. Judge Sand denied this motion, "a transparent ploy . . . to avoid any responsibility for the court decree or implementation of the housing remedy order." App. 275.

In response to the city's recalcitrance, respondents moved for entry of a Long Term Plan Order based upon a draft piece of legislation that had recently been prepared by the city's attorneys and housing consultants. On June 13, following comments from the city, revisions by respondents, and an evidentiary hearing, Judge Sand entered a Long Term Plan Order which, accommodating the city's concerns, provided the details of the Affordable Housing Ordinance that the city council was required to enact pursuant to the Consent Decree. On the same day, this Court denied the city's petition for writ of certiorari to review the original finding of liabil-

ity and the Housing Remedy Order. *Yonkers Board of Education* v. *United States*, 486 U. S. 1055 (1988).

The next day, the city council unanimously passed a resolution declaring a moratorium on all public housing construction in Yonkers, in unabashed defiance of the Housing Remedy Order, Consent Decree, and Long Term Plan Order. Nearly two months after the deadline set in the Consent Decree for the city's enactment of the necessary implementing legislation, the city council informed Judge Sand through the city attorney that it would not consider taking any legislative action until August at the earliest.

In light of the city's renewed defiance, Judge Sand sought assurance of the city's basic commitment to comply. He orally requested the city council to pass a resolution endorsing the provisions of the Consent Decree and the Long Term Plan Order, with enactment of the Affordable Housing Ordinance to follow after the city fine-tuned some final aspects. The city council responded by defeating a resolution that would have required it to honor its previous commitments.[2]

Respondents then submitted a proposed order setting a timetable for the city's enactment of the promised Affordable Housing Ordinance, under penalty of contempt. The city baldly responded that it would "not voluntarily adopt the legislation contemplated by" the Consent Decree and the Long Term Plan Order. Thereafter, Judge Sand entered an order (Contempt Order) directing the city to enact by August 1 the Affordable Housing Ordinance that had been drafted by the city's consultants to implement the Consent Decree and the Long Term Plan Order. The Contempt Order specified that if the Housing Ordinance were not timely enacted, the city and city councilmembers would face contempt adjudication and the following sanctions: the city would be fined $100 for the first day and the amount would double each day of noncompliance thereafter; and the councilmembers voting

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[2] The vote was 5 to 1; all four petitioners were in the majority.

against the legislation would be fined $500 per day and incarcerated after 10 days of continued defiance. Then, to accommodate the city council's expressed concern that it could not adopt legislation by August 1 without running afoul of state notice and hearing requirements applicable to zoning changes, Judge Sand relaxed the Contempt Order's original mandate and stated that the Contempt Order would be considered satisfied if the council merely adopted a resolution committing the city to enact the Affordable Housing Ordinance after the state notice requirements had been met.

On August 1, the city council defeated such a resolution by a 4-to-3 vote. Finding this defeat "but the latest of a series of contempts," App. 416, Judge Sand held the city and each of the councilmembers who voted against the resolution in civil contempt and imposed the coercive sanctions specified in the Contempt Order.

On August 9, the Court of Appeals for the Second Circuit granted a stay of these contempt sanctions. On August 26, the court affirmed the contempt adjudications against both the city and petitioners but limited the city's escalating fines to an eventual ceiling of $1 million per day. The court concluded that neither the city nor petitioners could escape responsibility for refusing to comply with the Consent Decree that the council itself had approved. The court stayed issuance of its mandate, however, to permit application to this Court for a stay pending the filing of petitions for a writ of certiorari. We granted a stay of the contempt sanctions against the individual councilmembers on September 1, but we denied the city's application for a similar stay. *City of Yonkers* v. *United States*, 487 U. S. 1251 (1988). A week later, the city council finally enacted the Affordable Housing Ordinance, over the dissenting votes of petitioners Spallone and Fagan.[3]

[3] While this vote terminated the contempt sanctions, it by no means heralded a lasting commitment on the part of the city council actually to follow through on the remedial obligations imposed by the Affordable Housing

II

The Court today holds that Judge Sand acted within his discretion when he held in contempt and fined the city in an effort to coerce the city council to enact the legislation required by the Consent Decree. *Ante*, at 276. The Court holds, however, that Judge Sand's decision to assess personal fines against the individual councilmembers directly responsible for engineering and implementing the city's defiance constituted an abuse of discretion. Judge Sand should have considered personal sanctions, the Court believes, only if the city sanctions "failed to produce compliance within a reasonable time." *Ante*, at 280.

The Court's disfavor of personal sanctions rests on two premises: (1) Judge Sand should have known when he issued the Contempt Order that there was a "reasonable probability that sanctions against the city [alone] would accomplish the desired result," *ante*, at 278; and (2) imposing personal fines "effects a much greater perversion of the normal legislative process than does the imposition of sanctions on the city." *Ante*, at 280. Because personal fines were both completely superfluous to, and more intrusive than, sanctions against the city alone, the Court reasons, the personal fines constituted an abuse of discretion. Each of these premises is mistaken.

Ordinance. Since this date, no new public housing has been built in Yonkers. During the local city council election last November, petitioner Spallone "campaigned [for Mayor] on a pledge to continue the city's resistance to a Federal desegregation order requiring it to build low-income housing in white neighborhoods," N. Y. Times, Nov. 8, 1989, p. B1, col. 5, and Spallone was elected in a "race [that] was widely seen as a referendum on the housing desegregation plan." *Ibid.* Petitioners Chema and Fagan were reelected to the council, and the new member filling Spallone's vacated seat also opposes compliance; thus "candidates opposed to the housing plan appea[r] to hold a majority." *Ibid.* Whether Yonkers officials will *ever* comply with Judge Sand's orders attempting to remedy Yonkers' longstanding racial segregation remains an open question.

A

While acknowledging that Judge Sand "could not have been sure in late July that this would be the result," *ante*, at 277, the Court confidently concludes that Judge Sand should have been *sure enough* that fining the city would eventually coerce compliance that he should not have personally fined the councilmembers as well. In light of the information available to Judge Sand in July, the Court's confidence is chimerical. Although the escalating city fines eventually would have seriously disrupted many public services and employment, *ibid.*, the Court's failure even to consider the possibility that the councilmembers would maintain their defiant posture despite the threat of fiscal insolvency bespeaks an ignorance of Yonkers' history of entrenched discrimination and an indifference to Yonkers' political reality.

The Court first fails to adhere today to our longstanding recognition that the "district court has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States* v. *Paradise*, 480 U. S. 149, 184 (1987) (quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 6 (1971)).[4] Deference to the court's exercise of discretion is particularly appropriate where, as here, the record clearly reveals that the court employed extreme caution before taking the final step of holding the councilmembers personally in contempt. Judge Sand patiently weathered a whirlwind of evasive maneuvers and mis-

[4] See also, *e. g.*, *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 486 (1986) (Powell, J., concurring) (District Court, "having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy . . . would have been effective in ending petitioners' discriminatory practices"); *Fullilove* v. *Klutznick*, 448 U. S. 448, 508 (1980) (Powell, J., concurring) (Court has "recognized that the choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court'") (quoting *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part)).

representions, see *supra*, at 284–289; considered and rejected alternative means of securing compliance other than contempt sanctions;[5] and carefully considered the ramifications of personal fines. In the end, he readily acknowledged:

> "I know of no parallel for a court to say to an elected official: 'You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.' I find that extraordinary.
>
> "I find it so extraordinary that at great cost in terms of time and in terms of money and energy and implementation of court's orders, I have sought alternatives to that. But they have all been unsuccessful. . . ." App. 433.

After according no weight to Judge Sand's cautious and contextual judgment despite his vastly superior vantage

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[5]Judge Sand considered but ultimately discarded two alternatives: (1) vesting all of the city's legislative and executive power with respect to housing development in a judicially created affordable housing commission; and (2) "deeming" by judicial decree the Affordable Housing Ordinance to have been enacted and enjoining Yonkers' executive officials to comply with the ordinance despite its lack of legislative support. See *ante*, at 275. I agree with the Court that, given city council approval of the city's Consent Decree committing itself to pass legislation implementing the Housing Remedy Order, Judge Sand did not abuse his discretion by binding the city to its own commitment. *Ante*, at 276. Moreover, the city repeatedly objected to creation of an independent affordable housing commission, and because this remedy would have completely divested the council of all legislative power in the housing field, it is difficult to characterize it as a less intrusive means of remedying the discrimination. Finally, "deeming" the Affordable Housing Ordinance to have been passed likely would have been less effective in the long run. Judge Sand would have still faced a continuing compliance battle with the city council; as he observed, "[o]bviously, if the city council were to say, well, Judge Sand, those are your orders ["deeming" the Ordinance enacted], you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built." App. 357. Moreover, private developers would have been less likely to commit resources to the subsidized housing program absent an assurance of ongoing council support for the program evidenced by council resolution.

point, the Court compounds its error by committing two more. First, the Court turns a blind eye to most of the evidence available to Judge Sand suggesting that, because of the councilmembers' continuing intransigence, sanctions against the city alone might not coerce compliance and that personal sanctions would significantly increase the chance of success. Second, the Court fails to acknowledge that supplementing city sanctions with personal ones likely would secure compliance more promptly, minimizing the overall disruptive effect of the city sanctions on city services generally and long-term compliance with the Consent Decree in particular.

As the events leading up to the Contempt Order make clear, the recalcitrant councilmembers were extremely responsive to the strong segments of their constituencies that were vociferously opposed to racial residential integration. Councilmember Fagan, for example, explained that his vote against the Affordable Housing Ordinance required by the Consent Decree "was an act of defiance. The people clearly wanted me to say no to the judge." *Id.*, at 426. Councilmember Spallone declared openly that "I will be taking on the judge all the way down the line. I made a commitment to my people and that commitment remains." *Id.*, at 457–458. Moreover, once Yonkers had gained national attention over its refusal to integrate, many residents made it clear to their representatives on the council that they preferred bankrupt martyrdom to integration. As a contemporaneous article observed, "[t]he defiant Councilmen are riding a wave of resentment among their white constituents that is so intense that many insist they are willing to see the city bankrupted . . . ." N. Y. Times, Aug. 5, 1988, p. B2, col. 4. It thus was not evident that petitioners opposed bankrupting the city; at the very least, capitulation by any individual councilmember was widely perceived as political suicide. As a result, even assuming that each recalcitrant member sought to avoid city bankruptcy, each still had a very strong incentive to play "chicken" with his colleagues by continuing to defy the Con-

tempt Order while secretly hoping that at least one colleague would change his position and suffer the wrath of the electorate. As Judge Sand observed, "[w]hat we have here is competition to see who can attract the greatest notoriety, who will be the political martyr . . . *without regard to what is in the best interests of the City of Yonkers.*" App. 409 (emphasis added).

Moreover, acutely aware of these political conditions, the city attorney repeatedly warned Judge Sand *not* to assume that the threat of bankruptcy would compel compliance. See, *e. g.*, *id.*, at 410 (threatening to bankrupt city "punishes the innocent" but "doesn't necessarily coerce compliance by the council members"); *id.*, at 415 (bankrupting Yonkers "is indeed an unfortunate result that may obtain and that is exactly why we are urging that the city not be fined itself"). See also City of Yonkers' Reply Memorandum of Law in Support of Stay of Contempt Sanctions in No. 88–6178 (CA2), pp. 9–10 (city argued that "in the context of a media spectacle surrounding the defiance of the Councilmembers of the District Court's Order . . . there is little hope of avoiding municipal bankruptcy in the hopes that the individual Councilmembers will change their vote in the near future. This Court should not rely on the hope that the individual Councilmembers will rescue the City from bankruptcy").[6] The clearest warning that the risk of insolvency might not motivate capitulation came at the contempt hearing on August 2. The city proposed that its fines be stayed until August 15 so the council could hold a public hearing and that if the council had failed to adopt the required Affordable Housing Ordinance at that time, the fines would resume as compounded for the intervening time period, meaning the city would owe over $3.2 million the very next day, and over $104 million by the end of the week. After listening to this proposal, Judge Sand asked the city attorney:

[6] Memorandum filed with the Court of Appeals for the Second Circuit six days after Judge Sand held the city and petitioners in contempt.

> "Mr. Sculnick, seated behind you are all of the members of the city council of Yonkers. Are you making a good faith representation to the court that if such a stay were granted, you have reason to believe that on August 15th, the ordinance would be passed? Are you making such a representation?" App. 418.

Despite the fact that such an enormous liability would soon trigger bankruptcy, the city attorney replied:

> "No, your Honor, I don't have the factual basis for making that statement."[7] *Ibid.*

Even if one uncharitably infers in hindsight that the city attorney was merely posturing, given the extremely high stakes I cannot agree with the Court's implicit suggestion that Judge Sand was required to call the city's bluff.

The Court's opinion ignores this political reality surrounding the events of July 1988 and instead focuses exclusively on the fact that, eight months earlier, Judge Sand had secured compliance with another remedial order through the threat of city sanctions alone. *Ante*, at 277–278. But this remedial order had required only that the city council adopt a 1987–1988 Housing Assistance Plan, a prerequisite to the city's qualification for federal housing subsidies. In essence, Judge Sand had to threaten the city with contempt fines just to convince the council to *accept* over $10 million in federal funds.

[7] The same clear warning was provided to the Second Circuit. At its hearing on the city's stay application pending appeal, the court inquired whether the attorney had changed his mind and now had reason to believe that the threat of the accrued fines payable on August 15 would coerce compliance. The attorney replied as follows:

"No, I think that would be playing Russian roulette on the city's behalf. I couldn't in good conscience suggest this. I suggested it at the time because I hoped that because several council members had suggested that their concern was that they could not vote the zoning ordinance into effect without the prior notice and public hearing, that if we allowed them to vote on August 15th, that would get rid of that excuse. But *I have no reasonable belief that council members would change their vote.*" Tr. 13 (Aug. 9, 1988) (emphasis added).

Moreover, the city council capitulated by promising merely to accept the funds—any implied suggestion that it ever intended to *use* the money for housing was, of course, proved false by subsequent events. Indeed, a mere two months later, the city council offered to *return* approximately $30 million in federal funds in the event that this Court ultimately set aside the public housing provisions of the Housing Remedy Order. See *supra*, at 287. At this point, Judge Sand found that the city council had "crossed the line of any form of fiscal or other governmental responsibility." App. 409.

Moreover, any confidence that city sanctions alone would ever work again was eroded even further by the public outcry against the council's approval of the Consent Decree, which magnified the councilmembers' determination to defy future judicial orders. The council's post-Decree conduct represented renewed "efforts by the city council to extricate itself from the political consequences which it believes have resulted from its assuming any degree of responsibility in connection with implementation of the housing plan." *Id.*, at 272. Given the nature of the original contempt "success" and the heightened level of obstruction and recalcitrance thereafter, Judge Sand was justified in questioning whether the sanction of city fines alone would work again.

The Court, in addition to ignoring all of this evidence before concluding that city sanctions alone would eventually coerce compliance, also inexplicably ignores the fact that imposing personal fines in addition to sanctions against the city would not only help ensure but actually *hasten* compliance. City sanctions, by design, impede the normal operation of local government. Judge Sand knew that each day the councilmembers remained in contempt, the city would suffer an ever-growing financial drain that threatened not only to disrupt many critical city services but also to frustrate the long-term success of the underlying remedial scheme. Fines assessed against the public fisc directly "diminish the limited resources which the city has to comply with the Decree,"

United States v. *Providence*, 492 F. Supp. 602, 610 (RI 1980), and more generally curtail various public services with a likely disparate impact on poor and minority residents.

Given these ancillary effects of city sanctions, it seems to me entirely appropriate—indeed obligatory—for Judge Sand to have considered, not just whether city sanctions alone would *eventually* have coerced compliance, but also *how promptly* they would have done so. The Court's implicit conclusion that personal sanctions were redundant both exaggerates the likelihood that city sanctions alone would have worked at all, see *supra*, at 293–295, and also fails to give due weight to the importance of speed, because supplementing the city sanctions with personal sanctions certainly increased the odds for prompt success. At the very least, personal sanctions made political martyrdom a much more unattractive option for the councilmembers. In light of the tremendous stakes at issue, I cannot fault Judge Sand for deciding to err on the side of being safe rather than sorry.

In sum, the record does not support the Court's casual conclusion today that Judge Sand should have perceived a "reasonable probability that sanctions against the city [alone] would accomplish the desired result." *Ante*, at 278. Rather, the city councilmembers' vehement and unyielding defiance of Judge Sand's remedial orders, and his political acumen borne of eight years' firsthand experience with the Yonkers political environment, led him quite reasonably to believe that city sanctions alone would have induced compliance only slowly if at all and at great cost to the city and long-term remedial success, and that personal sanctions would enhance both the promptness and ultimate likelihood of compliance. Under these circumstances, Judge Sand's cautious exercise of contempt power was within the permissible bounds of his remedial discretion. The Court's determination to play district court-for-a-day—and to do so poorly—is indefensible.

B

The Court purports to bolster its judgment by contending that personal sanctions against city councilmembers effect a greater interference than city sanctions with the "'interests of . . . local authorities in managing their own affairs, consistent with the Constitution.'" *Ante*, at 276 (quoting *Milliken* v. *Bradley*, 433 U. S. 267, 280–281 (1977)). Without holding today that the doctrine of absolute legislative immunity itself is applicable to local (as opposed to state and regional) legislative bodies, *ante*, at 278, the Court declares that the principle of legislative independence underlying this doctrine "must inform the District Court's exercise of its discretion in a case such as this." *Ibid.*

According to the Court, the principle of legislative independence does not preclude the District Court from attempting to coerce the city councilmembers into compliance with their promises contained in the Consent Decree. The Court acknowledges that "[s]anctions directed against the city for failure to take actions such as those required by the consent decree coerce the city legislators and, of course, restrict the freedom of those legislators to act in accordance with their current view of the city's best interests." *Ante*, at 279. Nevertheless, the Court contends, the imposition of personal sanctions as a means of coercion "effects a much greater perversion of the normal legislative process" than city sanctions, *ante*, at 280, and therefore the principle of legislative independence favors the use of personal sanctions only as a fallback position. *Ibid.*

The Court explains that personal sanctions are designed to encourage legislators to implement the remedial decree "in order to avoid bankrupting themselves," *ibid.*, a decisionmaking process in which the recalcitrant councilmembers weigh the public's interests against their own private interests—a process thought inappropriate when legislators exercise their duty to represent their constituents. In contrast, city sanctions are designed to encourage legislators to act

out of concern for their constituents' presumed interest in a fiscally solvent city, *ibid.*, a decisionmaking process in which the councilmembers merely weigh competing public interests—"the sort of calculus in which legislators engage regularly." *Ibid.* At bottom, then, the Court seems to suggest that personal sanctions constitute a "greater perversion of the normal legislative process" merely because they do not replicate that process' familiar mode of decisionmaking.

But the Court has never evinced an overriding concern for replicating the "normal" decisionmaking process when designing coercive sanctions for state and local executive officials who, like legislators, presumably are guided by their sense of public duty rather than private benefit. While recognizing that injunctions against such executive officials occasionally must be enforced by criminal or civil contempt sanctions of fines or imprisonment, see, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678, 690–691 (1978), we have never held that fining or even jailing these officials for contempt is categorically more intrusive than fining their governmental entity in order to coerce compliance indirectly. Indeed, as the author of today's majority opinion has written,

> "There is no reason for the federal courts to engage in speculation as to whether the imposition of a fine against the State is 'less intrusive' than 'sending high state officials to jail.' So long as the rights of the plaintiffs and the authority of the District Court are amply vindicated by an award of fees [akin to a contempt fine for bad-faith litigation in defiance of federal court decrees], it should be a matter of no concern to the court whether those fees are paid by state officials personally or by the State itself." *Id.*, at 716 (REHNQUIST, J., dissenting) (citation omitted).

Thus the Court's position necessarily presumes that a district court, while seeking to coerce compliance with a consent decree promising to implement a specific remedy for a constitu-

tional violation, must take far greater care to preserve the "normal legislative process" (balancing only public interests) for local legislators than it must take to preserve the normal and analogous decisionmaking process for executive officials. But the Court cannot fairly derive this premise from the principle underlying the doctrine of legislative immunity.

The doctrine of legislative immunity recognizes that, when acting collectively to pursue a vision of the public good through legislation, legislators must be free to represent their constituents "without fear of outside interference" that would result from private lawsuits. *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719, 731 (1980). Of course, legislators are bound to respect the limits placed on their discretion by the Federal Constitution; they are duty bound not to enact laws they believe to be unconstitutional, and their laws will have no effect to the extent that courts believe them to be unconstitutional. But when acting "in the sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951)—*i. e.*, formulating and expressing their vision of the public good within self-defined constitutional boundaries—legislators are to be "immune from deterrents to the uninhibited discharge of their legislative duty." *Id.*, at 377. Private lawsuits threaten to chill robust representation by encouraging legislators to avoid controversial issues or stances in order to protect themselves "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Supreme Court of Virginia*, *supra*, at 732 (quoting *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967)).[8] To encourage legislators best to represent their constituents' interests, legislators must be afforded immunity from private suit.

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[8] Cf. *Powell* v. *McCormack*, 395 U. S. 486, 503 (1969) ("[T]he legislative immunity created by the Speech or Debate Clause . . . insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation").

But once a federal court has issued a valid order to remedy the effects of a prior, specific constitutional violation, the representatives are no longer "acting in a field where legislators traditionally have power to act." *Tenney, supra*, at 379.[9] At this point, the Constitution itself imposes an overriding definition of the "public good," and a court's valid command to obey constitutional dictates is not subject to override by any countervailing preferences of the polity, no matter how widely and ardently shared. Local legislators, for example, may not frustrate valid remedial decrees merely because they or their constituents would rather allocate public funds for other uses.[10] More to the point here, legislators certainly may not defy court-ordered remedies for racial discrimination merely because their constituents prefer to maintain segregation: "'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" *Palmore* v. *Sidoti*,

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[9] I do not mean to suggest that public policy concerns may play no role in designing the scope or content of the underlying remedial order. When each of a variety of different remedial programs would fully remedy the constitutional violation, for example, a district court should take into account relevant and important policy concerns voiced by government defendants in choosing among such remedies. Here, "[a]t every step of the proceedings, the [district] court has stayed its hand to enable the elected representatives of Yonkers to have the maximum input in shaping the destiny of Yonkers." App. 205.

[10] See, *e. g.*, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 681 (1978) (observing historical practice of district courts' "ordering that taxes be levied and collected [by municipalities] to discharge federal-court judgments, once a constitutional infraction was found"); *Griffin* v. *Prince Edward County School Board*, 377 U. S. 218, 233 (1964) (district court could "require the [County] Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system . . ."); cf. *Watson* v. *Memphis*, 373 U. S. 526, 537 (1963) ("[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them").

466 U. S. 429, 433 (1984) (quoting *Palmer* v. *Thompson*, 403 U. S. 217, 260–261 (1971) (WHITE, J., dissenting)). Defiance at this stage results, in essence, in a perpetuation of the very constitutional violation at which the remedy is aimed. See *supra*, at 283–284.[11] Hence, once Judge Sand found that the city (through acts of its council) had engaged in a pattern and practice of racial discrimination in housing and had issued a valid remedial order, the city councilmembers became obliged to respect the limits thereby placed on their legislative independence.[12]

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[11] See *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 459 (1979) (once court orders desegregation remedy, "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment"). Put another way, remedial defiance by the legislature circumvents the structural protections afforded the citizenry from unconstitutional government behavior by a multibranch review process, see *supra*, at 300–301, by allowing the legislature *de facto* to override the court's ruling in a particular case that its behavior violates the Fourteenth Amendment. Cf. *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958) ("'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery'") (quoting *United States* v. *Peters*, 5 Cranch 115, 136 (1809)).

Indeed, even were the councilmembers to maintain that the Affordable Housing Ordinance they were required to enact *itself* violated the Constitution, for example, by mandating unjustified racial preferences, the members would nevertheless be bound by a court order considering yet rejecting their constitutional objection. See *Cooper*, *supra*, at 18 ("[F]ederal judiciary is supreme in the exposition of the law of the Constitution" in case adjudication). But in any event, the councilmembers raised no serious substantive objections, constitutional or otherwise, to the ordinance (which after all was based on the city council-approved Consent Decree). See, *e. g.*, App. 416 ("The City of Yonkers through its council has represented to this court that there are no substantive objections to the affordable housing ordinance").

[12] Petitioner Chema claims that his legislative discretion is protected by the First Amendment as well. Characterizing his vote on proposed legislation as core political speech, he contends that the Order infringes his right to communicate with his constituents through his vote. This attempt to recharacterize the common-law legislative immunity doctrine into

In light of the limited scope of the principle of legislative independence underlying the immunity doctrine, the Court's desire to avoid "perversion of the normal legislative process" by preserving the "sort of calculus in which legislators engage regularly," *ante*, at 280, is misguided. The *result* of the councilmembers' "calculus" is preordained, and the only relevant question is how the court can best encourage—or if necessary coerce—compliance. There is no independent value at this point to replicating a familiar decisionmaking process; certainly there is none so overwhelming as to justify stripping the District Court of a coercive weapon it quite reasonably perceived to be necessary under the circumstances.[13]

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traditional First Amendment terms is unpersuasive. While the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance; voting to implement a remedial decree is best understood as a ministerial step in the process of executing a decision made by government actors with superior authority. Councilmember Chema can no more claim immunity from sanctions for refusing to comply with the District Court's binding order by virtue of the First Amendment than could a Yonkers housing official refuse to issue private developers written exemptions from zoning restrictions as required by the Affordable Housing Ordinance, or indeed than could Judge Sand on remand refuse to issue an order implementing the Court's decision in this case should he disagree with it.

[13] To be sure, imposing sanctions against the city allowed councilmembers to comply with the court order while publicly explaining that their decision to do so was motivated by a desire to promote their constituents' overall interests (even though, as explained above, compliance was mandatory and therefore this appearance of deference to constituent pressure was merely a charade). But any suggestion that city sanctions were somehow less "perverse" than personal sanctions because the former allowed councilmembers more easily to cling to their self-defined political martyrdom is untenable; it seems absurd to suggest that Judge Sand ought to have been concerned with providing the councilmembers guilty of unconscionable behavior a handy public excuse for their belated compliance. Of course, providing the recalcitrant councilmembers with a public-oriented excuse for compliance probably increased the likelihood of successful coercion. But at most this insight suggests that sanctioning the individual councilmembers alone might not have succeeded; it does not fault Judge

Moreover, even if the Court's characterization of personal fines against legislators as "perverse" were persuasive, it would still represent a myopic view of the relevant remedial inquiry. To the extent that equitable limits on federal courts' remedial power are designed to protect against unnecessary judicial intrusion into state or local affairs, it was obviously appropriate for Judge Sand to have considered the fact that the city's accrual of fines would have quickly disrupted every aspect of the daily operation of local government. See *supra*, at 296–297. Particularly when these broader effects are considered, the Court's pronouncement that fining the city is categorically less intrusive than fining the legislators personally is untenable.[14]

Sand's decision to impose both sanctions simultaneously, and it hardly renders his action an abuse of discretion.

[14] The Court repeatedly points out that the individual legislators were not parties to the original action. *Ante*, at 274, 276. This accurate observation explains why the lawsuit did not itself contravene the principle underlying the doctrine of legislative immunity. See *supra*, at 300; cf. *Powell* v. *McCormack*, 395 U. S., at 505 ("Freedom of legislative activity . . . [is] fully protected if legislators are relieved of the burden of defending themselves").

It is unclear, however, why the Court repeatedly insists that the individual city councilmembers were not specifically enjoined by the Housing Remedy Order to participate in the remedial process. *Ante*, at 274, 277. As a factual proposition, this insistence is misguided. First, the opening proviso of the Housing Remedy Order, which binds the "City of Yonkers, its officers, agents, employees, successors, and all persons in active concert or participation with any of them" to refrain from future discriminatory acts, can easily be understood to refer equally to all substantive provisions of the Order. Second, the Consent Decree, specifically approved by the city council, contemplated that the city would "adopt legislation"; this Decree was universally understood to impose duties directly upon the councilmembers, the only city officials with authority to adopt legislation. Third, the remedial duties were, by operation of law, "binding . . . upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with

C

I concede that personal sanctions against legislators intuitively may seem less appropriate than more traditional forms of coercing compliance with court orders. But this intuition does not withstand close scrutiny given the circumstances of these cases. When necessary, courts levy personal contempt sanctions against other types of state and local officials for flouting valid court orders, and I see no reason to treat local legislators differently when they are acting outside of their "sphere of legitimate legislative activity." *Tenney*, 341 U. S., at 376.

The key question here, therefore, is whether Judge Sand abused his discretion when he decided not to rely on sanctions against the city alone but also to apply coercive pressure to the recalcitrant councilmembers on an individual basis. Given the city council's consistent defiance and the delicate political situation in Yonkers, Judge Sand was justifiably uncertain as to whether city sanctions alone would coerce compliance at all and, if so, whether they would do so promptly; the longer the delay in compliance, the more likely that city services would be curtailed drastically and that both budgetary constraints and growing racial tensions would undermine the long-term efficacy of the remedial decree. Under these conditions, Judge Sand's decision to supplement the city sanctions with personal fines was surely a sensible approach. The Court's contrary judgment rests on its refusal to take the fierceness of the councilmembers' defi-

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them who receive actual notice of the order by personal service or otherwise." Fed. Rule Civ. Proc. 65(d).

But even assuming, *arguendo*, that the individual city councilmembers were not named parties in the original Housing Remedy Order, this fact would not preclude a finding of personal contempt given the clear notice afforded by the Contempt Order, and the Court nowhere explains how this fact could make resort to personal sanctions more "intrusive" than resort to city sanctions.

ance seriously, a refusal blind to the scourge of racial politics in Yonkers and dismissive of Judge Sand's wisdom borne of his superior vantage point.

III

The Court's decision today that Judge Sand abused his remedial discretion by imposing personal fines simultaneously with city fines creates no new principle of law; indeed, it invokes no principle of any sort. But it directs a message to district judges that, despite their repeated and close contact with the various parties and issues, even the most delicate remedial choices by the most conscientious and deliberate judges are subject to being second-guessed by this Court. I hope such a message will not daunt the courage of district courts that, if ever again faced with such protracted defiance, must carefully yet firmly secure compliance with their remedial orders. But I worry that the Court's message will have the unintended effect of emboldening recalcitrant officials continually to test the ultimate reach of the remedial authority of the federal courts, thereby postponing the day when all public officers finally accept that "the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding." *Cooper* v. *Aaron*, 358 U. S. 1, 26 (1958) (Frankfurter, J., concurring).

I dissent.

Syllabus

JAMES *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 88–6075. Argued October 3, 1989—Decided January 10, 1990

The day after a shooting which left one of a group of eight boys dead and another seriously injured, police took petitioner James into custody as a suspect. James, who then had black curly hair, admitted under police questioning that the previous day his hair had been reddish brown, long, and combed straight back, and that he had just dyed and curled it in order to change his appearance. After James was indicted for murder and attempted murder, the trial court sustained his motion to suppress the statements about his hair as fruit of an unlawful arrest. At trial, five members of the group of boys testified that the shooter had slicked-back, shoulder-length, reddish hair, and that they had seen James several weeks earlier with hair that color and style. Each boy identified James as the shooter even though at trial he had black hair worn in a "natural" style. James did not testify in his defense, but called one Henderson, who testified that on the day of the shooting James had had black hair. The court permitted the State to introduce James' illegally obtained statements to impeach Henderson's testimony. James was convicted on both counts. The Illinois Appellate Court reversed the convictions on the ground that the exclusionary rule barred the admission of the illegally obtained statements for the purpose of impeaching a defense witness' testimony. The State Supreme Court reversed, reasoning that the impeachment exception to the exclusionary rule—which permits the prosecution to introduce illegally obtained evidence to impeach the defendant's own testimony—should be expanded to include the testimony of other defense witnesses in order to deter the defendant from engaging in perjury "by proxy."

Held: The State Supreme Court erred in expanding the impeachment exception to encompass the testimony of all defense witnesses. Such expansion would frustrate rather than further the purposes underlying the exclusionary rule. The truth-seeking rationale supporting the impeachment of defendants does not apply with equal force to other witnesses. The State Supreme Court's "perjury by proxy" premise is suspect, since the threat of a criminal prosecution for perjury is far more likely to deter a witness from intentionally lying than to deter a defendant, already facing conviction, from lying on his own behalf. Moreover, some defendants likely would be chilled from calling witnesses who would otherwise offer probative evidence out of fear that those witnesses might make

some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment. Finally, expansion of the exception would significantly weaken the exclusionary rule's deterrent effect on police misconduct by enhancing the expected value to the prosecution of illegally obtained evidence, both by vastly increasing the number of occasions on which such evidence could be used and also, due to the chilling effect, by deterring defendants from calling witnesses in the first place and thereby keeping exculpatory evidence from the jury. The exclusion of illegal evidence from the prosecution's case in chief would not provide sufficient deterrence to protect the privacy interests underlying the rule. When police officers confront opportunities to obtain illegal evidence after they have legally obtained sufficient evidence to sustain a prima facie case, excluding such evidence from only the case in chief would leave officers with little to lose and much to gain by overstepping the constitutional limits on evidence gathering. Pp. 311–319.

123 Ill. 2d 523, 528 N. E. 2d 723, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 320. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post*, p. 322.

Martin S. Carlson argued the cause for petitioner. With him on the briefs were *Theodore A. Gottfried*, *Michael J. Pelletier*, and *Patricia Unsinn*.

Terence M. Madsen, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, *Arleen C. Anderson*, *Nathan P. Maddox*, and *Michael J. Singer*, Assistant Attorneys General, *Cecil A. Partee*, *Inge Fryklund*, and *Sharon Johnson Coleman*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The impeachment exception to the exclusionary rule permits the prosecution in a criminal proceeding to introduce il-

Solicitor General Starr, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Joel Gershowitz* filed a brief for the United States as *amicus curiae* urging affirmance.

legally obtained evidence to impeach the defendant's own testimony. The Illinois Supreme Court extended this exception to permit the prosecution to impeach the testimony of *all* defense witnesses with illegally obtained evidence. 123 Ill. 2d 523, 528 N. E. 2d 723 (1988). Finding this extension inconsistent with the balance of values underlying our previous applications of the exclusionary rule, we reverse.

I

On the night of August 30, 1982, eight young boys returning home from a party were confronted by a trio of other boys who demanded money. When the eight boys refused to comply, one member of the trio produced a gun and fired into the larger group, killing one boy and seriously injuring another. When the police arrived, the remaining members of the larger group provided eyewitness accounts of the event and descriptions of the perpetrators.

The next evening, two detectives of the Chicago Police Department took 15-year-old Darryl James into custody as a suspect in the shooting. James was found at his mother's beauty parlor sitting under a hair dryer; when he emerged, his hair was black and curly. After placing James in their car, the detectives questioned him about his prior hair color. He responded that the previous day his hair had been reddish brown, long, and combed straight back. The detectives questioned James again later at the police station, and he further stated that he had gone to the beauty parlor in order to have his hair "dyed black and curled in order to change his appearance." App. 11.

The State subsequently indicted James for murder and attempted murder. Prior to trial, James moved to suppress the statements regarding his hair, contending that they were the fruit of a Fourth Amendment violation because the detectives lacked probable cause for his warrantless arrest. After an evidentiary hearing, the trial court sustained this

motion and ruled that the statements would be inadmissible at trial.

At trial, five members of the larger group of boys testified for the State, and each made an in-court identification of the defendant. Each testified that the person responsible for the shooting had "reddish" hair, worn shoulder length in a slicked-back "butter" style. Each also recalled having seen James several weeks earlier at a parade, at which time James had the aforementioned hair color and style. At trial, however, his hair was black and worn in a "natural" style. Despite the discrepancy between the witnesses' description and his present appearance, the witnesses stood firm in their conviction that James had been present and had fired the shots.

James did not testify in his own defense. He called as a witness Jewel Henderson, a friend of his family. Henderson testified that on the day of the shooting she had taken James to register for high school and that, at that time, his hair was black. The State then sought, over James' objection, to introduce his illegally obtained statements as a means of impeaching the credibility of Henderson's testimony. After determining that the suppressed statements had been made voluntarily, the trial court overruled James' objection. One of the interrogating detectives then reported James' prior admissions that he had reddish hair the night of the shooting and he dyed and curled his hair the next day in order to change his appearance. James ultimately was convicted of both murder and attempted murder and sentenced to 30 years' imprisonment.

On appeal, the Illinois Appellate Court reversed James' convictions and ordered a new trial. 153 Ill. App. 3d 131, 505 N. E. 2d 1118 (1987). The appellate court held that the exclusionary rule barred admission of James' illegally obtained statements for the purpose of impeaching a defense witness' testimony and that the resulting constitutional error was not harmless. However, the Illinois Supreme Court re-

versed. The court reasoned that, in order to deter the defendant from engaging in perjury "by proxy," the impeachment exception to the exclusionary rule ought to be expanded to allow the State to introduce illegally obtained evidence to impeach the testimony of defense witnesses other than the defendant himself. The court therefore ordered James' convictions reinstated. We granted certiorari. 489 U. S. 1010 (1989).

II

"There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States* v. *Havens*, 446 U. S. 620, 626 (1980). But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history. "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. . . . [W]ithout it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" *Terry* v. *Ohio*, 392 U. S. 1, 12 (1968), quoting *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values: "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, 480 U. S. 321, 329 (1987).

This Court has carved out exceptions to the exclusionary rule, however, where the introduction of reliable and probative evidence would significantly further the truth-seeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a "speculative possibility." *Harris* v. *New York*, 401 U. S.

222, 225 (1971).[1] One exception to the rule permits prosecutors to introduce illegally obtained evidence for the limited purpose of impeaching the credibility of the defendant's own testimony. This Court first recognized this exception in *Walder* v. *United States*, 347 U. S. 62 (1954), permitting the prosecutor to introduce into evidence heroin obtained through an illegal search to undermine the credibility of the defendant's claim that he had never possessed narcotics. The Court explained that a defendant

> "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Id.*, at 65.

In *Harris* v. *New York*, *supra*, and *Oregon* v. *Hass*, 420 U. S. 714 (1975), the Court applied the exception to permit prosecutors to impeach defendants using incriminating yet voluntary and reliable statements elicited in violation of *Miranda* requirements.[2] Finally, in *United States* v. *Havens*, *supra*, the Court expanded the exception to permit

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[1] See generally *Illinois* v. *Krull*, 480 U. S. 340, 347 (1987) (when evaluating proposed exceptions to the exclusionary rule, this Court "has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process"); *United States* v. *Leon*, 468 U. S. 897, 908–913 (1984) (discussing balancing approach).

Certain Members of the Court have previously expressed their view that the exclusionary rule is designed not merely to deter police misconduct but also to prevent courts from becoming parties to the constitutional violation by admitting illegally obtained evidence at trial. See *United States* v. *Leon*, 468 U. S., at 931–938 (BRENNAN, J., joined by MARSHALL, J., dissenting); *id.*, at 976–978 (STEVENS, J., concurring in judgment in part and dissenting in part).

[2] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

prosecutors to introduce illegally obtained evidence in order to impeach a defendant's "answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination." *Id.*, at 627.

This Court insisted throughout this line of cases that "evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." *Id.*, at 628.[3] However, because the Court believed that permitting the use of such evidence to impeach defendants' testimony would further the goal of truthseeking by preventing defendants from perverting the exclusionary rule "'into a license to use perjury by way of a defense,'" *id.*, at 626 (citation omitted), and because the Court further believed that permitting such use would create only a "speculative possibility that impermissible police conduct will be encouraged thereby," *Harris*, *supra*, at 225, the Court concluded that the balance of values underlying the exclusionary rule justified an exception covering impeachment of defendants' testimony.

III

In this case, the Illinois Supreme Court held that our balancing approach in *Walder* and its progeny justifies expanding the scope of the impeachment exception to permit prosecutors to use illegally obtained evidence to impeach the credibility of defense witnesses. We disagree. Expanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers. As a result, this expansion would not promote the truth-seeking function to the same extent as did creation of the original exception, and yet it would significantly under-

[3] See also *Oregon* v. *Hass*, 420 U. S. 714, 721 (1975) ("[T]rial court instructed the jury that the statements attributed to [defendant] could be used only in passing on his credibility and not as evidence of guilt"); *Harris* v. *New York*, 401 U. S. 222, 223 (1971) (same); *Walder* v. *United States*, 347 U. S. 62, 64 (1954) (same).

mine the deterrent effect of the general exclusionary rule. Hence, we believe that this proposed expansion would frustrate rather than further the purposes underlying the exclusionary rule.

The previously recognized exception penalizes defendants for committing perjury by allowing the prosecution to expose their perjury through impeachment using illegally obtained evidence. Thus defendants are discouraged in the first instance from "affirmatively resort[ing] to perjurious testimony." *Walder*, *supra*, at 65. But the exception leaves defendants free to testify truthfully on their own behalf; they can offer probative and exculpatory evidence to the jury without opening the door to impeachment by carefully avoiding any statements that directly contradict the suppressed evidence. The exception thus generally discourages perjured testimony without discouraging truthful testimony.

In contrast, expanding the impeachment exception to encompass the testimony of all defense witnesses would not have the same beneficial effects. First, the mere threat of a subsequent criminal prosecution for perjury is far more likely to deter a witness from intentionally lying on a defendant's behalf than to deter a defendant, already facing conviction for the underlying offense, from lying on his own behalf. Hence the Illinois Supreme Court's underlying premise that a defendant frustrated by our previous impeachment exception can easily find a witness to engage in "perjury by proxy" is suspect.[4]

More significantly, expanding the impeachment exception to encompass the testimony of all defense witnesses likely would chill some defendants from presenting their best de-

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[4] The dissent concedes, as it must, that "of course, false testimony can result from faulty recollection" as opposed to intentional lying. *Post*, at 326. Even assuming that Henderson's testimony in this case (as opposed to the detective's contrary testimony) was indeed false, nothing in the record suggests that Henderson intentionally committed perjury rather than honestly provided her best (even if erroneous) perception and recollection of events.

fense—and sometimes any defense at all—through the testimony of others. Whenever police obtained evidence illegally, defendants would have to assess prior to trial the likelihood that the evidence would be admitted to impeach the otherwise favorable testimony of any witness they call. Defendants might reasonably fear that one or more of their witnesses, in a position to offer truthful and favorable testimony, would also make some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment. First, defendants sometimes need to call "reluctant" or "hostile" witnesses to provide reliable and probative exculpatory testimony, and such witnesses likely will not share the defendants' concern for avoiding statements that invite impeachment through contradictory evidence. Moreover, defendants often cannot trust even "friendly" witnesses to testify without subjecting themselves to impeachment, simply due to insufficient care or attentiveness. This concern is magnified in those occasional situations when defendants must call witnesses to testify despite having had only a limited opportunity to consult with or prepare them in advance. For these reasons, we have recognized in a variety of contexts that a party "cannot be absolutely certain that his witnesses will testify as expected." *Brooks* v. *Tennessee*, 406 U. S. 605, 609 (1972).[5] As a re-

[5] These reasons to doubt a party's ability to control the testimony of his own witnesses led long ago to abandonment of the common-law rule that a party automatically "vouches for" and hence is inexorably bound by what the witnesses say. See, *e. g.*, Fed. Rule Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling him"); see generally 3A J. Wigmore, Evidence § 899, p. 655 (J. Chadbourn rev. 1970) ("[E]very experienced lawyer knows that he is often required to call witnesses who happen to have some knowledge of the facts but whose trustworthiness he could not guarantee. There are also many occasions upon which a lawyer is surprised by the witness testifying in direct contradiction to a prior statement given to the attorney" (citation omitted)); cf. *Chambers* v. *Mississippi*, 410 U. S. 284 (1973) (state evidentiary rule precluding defendant from impeaching own witness after witness offered

sult, an expanded impeachment exception likely would chill some defendants from calling witnesses who would otherwise offer probative evidence.[6]

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incriminating testimony violated due process). See also *Imbler* v. *Pachtman*, 424 U. S. 409, 426 (1976) (holding prosecutors absolutely immune from damages liability for having knowingly presented perjured witness testimony against criminal defendants, observing that the "veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify . . . . If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, [they often would refrain from calling such witnesses and hence] the triers of fact in criminal cases often would be denied relevant evidence"); *id.*, at 446 (WHITE, J., concurring in judgment) ("[O]ne of the effects of permitting suits for knowing use of perjured testimony will be detrimental to the [truth-seeking] process—prosecutors may withhold questionable but valuable testimony from the court").

[6] Apparently to minimize this concern, the Illinois Supreme Court suggested that prosecutors could impeach witnesses only with respect to statements that are "purposely presented by the defendant." 123 Ill. 2d 523, 537, 528 N. E. 2d 723, 729 (1988). However, the court did not even purport to determine whether James had "purposely presented" Henderson's testimony that his hair had been black on the day of the shooting, an omission that clearly highlights "the difficulty of determining whether particular testimony elicited from a defense witness was 'purposely presented' by the defendant." Brief for United States as *Amicus Curiae* 21, n. 5. Given the inherent subjectivity of this proposed test, a defendant could hardly be confident that all witness statements that are actually inadvertent or surprising to the defendant will be found to be such by the trial court so as not to open the door to impeachment. This proposed limitation thus would not meaningfully blunt the chill imposed on defendants' presentation of witnesses.

The Illinois Supreme Court also suggested that prosecutors could be allowed to impeach witnesses only with respect to statements offered on direct examination, perhaps recognizing that defendants likely would feel even more insecure about their witnesses' ability to avoid statements triggering admissibility of suppressed evidence when responding to cross-examination by the prosecutor. We need not decide whether there is a salient distinction between direct and cross-examination in this context, cf. *United States* v. *Havens*, 446 U. S. 620 (1980) (rejecting such distinction with respect to defendants' testimony), because even the more limited ex-

This realization alters the balance of values underlying the current impeachment exception governing defendants' testimony. Our prior cases make clear that defendants ought not be able to "pervert" the exclusion of illegally obtained evidence into a shield for perjury, but it seems no more appropriate for the State to brandish such evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses. Given the potential chill created by expanding the impeachment exception, the conceded gains to the truth-seeking process from discouraging or disclosing perjured testimony would be offset to some extent by the concomitant loss of probative witness testimony. Thus, the truth-seeking rationale supporting the impeachment of defendants in *Walder* and its progeny does not apply to other witnesses with equal force.

Moreover, the proposed expansion of the current impeachment exception would significantly weaken the exclusionary rule's deterrent effect on police misconduct. This Court has characterized as a mere "speculative possibility," *Harris* v. *New York*, 401 U. S., at 225, the likelihood that permitting prosecutors to impeach defendants with illegally obtained

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pansion of the impeachment exception would palpably inhibit defendants' presentation of a defense.

Finally, the dissent embraces the Illinois Supreme Court's suggestion that prosecutors could be allowed to impeach witnesses only when their testimony is in "direct conflict" with the illegally seized evidence. *Post*, at 325. The dissent suggests that judicial inquiry as to the inconsistency of various statements is "commonplace" under various rules of evidence. *Post*, at 325, n. 1. But the result of such an inquiry distinguishing between "direct" and "indirect" evidentiary conflicts is far from predictable. Indeed, the authority upon which the dissent relies to define a direct evidentiary conflict observes that "[s]uch is the possible variety of statement that it is often difficult to determine whether this inconsistency exists." 3A Wigmore § 1040, at 1048. The *ex ante* uncertainty whether a court might find a witness' testimony to pose a "direct" conflict and therefore trigger the impeachment exception likely will chill defendants' presentation of potential witnesses in many cases.

evidence would encourage police misconduct. Law enforcement officers will think it unlikely that the defendant will first decide to testify at trial and will also open the door inadvertently to admission of any illegally obtained evidence. Hence, the officers' incentive to acquire evidence through illegal means is quite weak.

In contrast, expanding the impeachment exception to *all* defense witnesses would significantly enhance the expected value to the prosecution of illegally obtained evidence. First, this expansion would vastly increase the number of occasions on which such evidence could be used. Defense witnesses easily outnumber testifying defendants, both because many defendants do not testify themselves and because many if not most defendants call multiple witnesses on their behalf. Moreover, due to the chilling effect identified above, see *supra*, at 315–316, illegally obtained evidence holds even greater value to the prosecution for each individual witness than for each defendant. The prosecutor's access to impeachment evidence would not just deter perjury; it would also deter defendants from calling witnesses in the first place, thereby keeping from the jury much probative exculpatory evidence. For both of these reasons, police officers and their superiors would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution's favor. It is thus far more than a "speculative possibility" that police misconduct will be encouraged by permitting such use of illegally obtained evidence.

The United States argues that this result is constitutionally acceptable because excluding illegally obtained evidence solely from the prosecution's case in chief would still provide a quantum of deterrence sufficient to protect the privacy interests underlying the exclusionary rule.[7] We disagree. Of course, a police officer might in certain situations believe that obtaining particular evidence through illegal means, re-

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[7] Brief for United States as *Amicus Curiae* 18–22.

sulting in its suppression from the case in chief, would prevent the prosecution from establishing a prima facie case to take to a jury. In such situations, the officer likely would be deterred from obtaining the evidence illegally for fear of jeopardizing the entire case. But much if not most of the time, police officers confront opportunities to obtain evidence illegally after they have already legally obtained (or know that they have other means of legally obtaining) sufficient evidence to sustain a prima facie case. In these situations, a rule requiring exclusion of illegally obtained evidence from only the government's case in chief would leave officers with little to lose and much to gain by overstepping constitutional limits on evidence gathering.[8] Narrowing the exclusionary rule in this manner, therefore, would significantly undermine the rule's ability "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). So long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception.

IV

The cost to the truth-seeking process of evidentiary exclusion invariably is perceived more tangibly in discrete prosecutions than is the protection of privacy values through deterrence of future police misconduct. When defining the precise scope of the exclusionary rule, however, we must focus on systemic effects of proposed exceptions to ensure

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[8] Indeed, the detectives who unlawfully detained James and elicited his incriminating statements already knew that there were several eyewitnesses to the shooting. Because the detectives likely believed that the exclusion of any statement they obtained from James probably would not have precluded the prosecution from making a prima facie case, an exclusionary rule applicable only to the prosecution's case in chief likely would have provided little deterrent effect in this case.

that individual liberty from arbitrary or oppressive police conduct does not succumb to the inexorable pressure to introduce all incriminating evidence, no matter how obtained, in each and every criminal case. Our previous recognition of an impeachment exception limited to the testimony of defendants reflects a careful weighing of the competing values. Because expanding the exception to encompass the testimony of all defense witnesses would not further the truth-seeking value with equal force but would appreciably undermine the deterrent effect of the exclusionary rule, we adhere to the line drawn in our previous cases.

Accordingly, we hold that the Illinois Supreme Court erred in affirming James' convictions despite the prosecutor's use of illegally obtained statements to impeach a defense witness' testimony. The court's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

While I join the opinion of the Court, certain comments in the dissent prompt this postscript. The dissent answers the wrong question when it states that "[t]he interest in protecting the truth-seeking function of the criminal trial is every bit as strong in this case as in our earlier cases." *Post*, at 324. This is self-evident. The State always has a strong interest in the truth-seeking function. The proper question, however, is whether the admission of the illegally obtained evidence in this case would sufficiently advance the truth-seeking function to overcome the loss to the deterrent value of the exclusionary rule. With respect to this issue, the dissent overestimates the benefit of the exclusionary rule even to the defendant bent on presenting perjured testimony and exaggerates the injury that exclusion of unlawfully obtained evidence causes to the truth-seeking function.

In "contested criminal trials," *post*, at 326, the urge to win can unfortunately lead each side to overstate its case. As

the Court properly observes, the ability of the dishonest defendant to procure false testimony is tempered by the availability of the illegally obtained evidence for use in a subsequent perjury prosecution of the defense witness. *Ante*, at 314. A witness who is not on trial faces a far different calculus than one whose testimony can mean the difference between acquittal and a prison sentence. He or she will think long and hard before accepting a defendant's invitation to knowingly offer false testimony that is directly contradicted by the State's evidence. The dissent ignores this "hard reality," *post*, at 326, in presuming that a defense witness will offer false testimony when that testimony is immunized from rebuttal at trial.

While the dissent assumes false testimony or, at least, faulty recollection with respect to defense witnesses, it is unwilling to entertain the same assumption with respect to the prosecution's witnesses. The evidentiary issue in this case involves the testimony of a police officer about a statement that he allegedly heard the defendant make at the time of his arrest. An officer whose testimony provides the foundation for admission of an oral statement or physical evidence may be influenced by his interest in effective law enforcement or may simply have faulty recollection. It is only by giving 100-percent credence to every word of the officer's testimony that the dissent can so categorically state that "the defendant himself revealed the witness' testimony to be false," *post*, at 324, that "James . . . said his hair was previously red," *post*, at 327, n. 2, or that information presented to the jury was "known to be untrue," *post*, at 327. That assumption is no more warranted in the case of prosecution witnesses than the opposite assumption is warranted in the case of defense witnesses.

In this case, in which the guilty verdict is supported by the testimony of five eyewitnesses, it is highly probable that these characterizations are accurate. But the testimony of those five witnesses, on which the dissenters rely for their conclusion that any error committed by the trial court was

harmless, *post*, at 330, would also seem to be sufficient to obviate the need to rely on the officer's rebuttal to discredit the witness Henderson's testimony. Were the officer's testimony not so corroborated, it would surely be improper to presume—as the dissenters do—that the conflict between the testimony of the officer and Henderson should necessarily be resolved in the officer's favor or that exclusion of the evidence would result in a decision by jurors who are "positively misled." *Post*, at 324.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

To deprive the prosecution of probative evidence acquired in violation of the law may be a tolerable and necessary cost of the exclusionary rule. Implementation of the rule requires us to draw certain lines to effect its purpose of deterring unlawful conduct. But the line drawn by today's opinion grants the defense side in a criminal case broad immunity to introduce whatever false testimony it can produce from the mouth of a friendly witness. Unless petitioner's conviction is reversed, we are told, police would flout the Fourth Amendment, and as a result, the accused would be unable to offer any defense. This exaggerated view leads to a drastic remedy: The jury cannot learn that defense testimony is inconsistent with probative evidence of undoubted value. A more cautious course is available, one that retains Fourth Amendment protections and yet safeguards the truth-seeking function of the criminal trial.

Our precedents establish that the exclusionary rule does not apply where the interest in pursuing truth or other important values outweighs any deterrence of unlawful conduct that the rule might achieve. See, *e. g.*, *Illinois* v. *Krull*, 480 U. S. 340, 347–348 (1987); *United States* v. *Leon*, 468 U. S. 897, 906–907 (1984); *Stone* v. *Powell*, 428 U. S. 465, 486–489 (1976); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974). One instance is a defendant's attempt to take advantage by presenting testimony in outright contradiction of ex-

cluded facts, secure in the knowledge that the inconsistency will not be revealed to the jury. As we said over 35 years ago:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* [v. *United States*, 232 U. S. 383 (1914),] doctrine would be a perversion of the Fourth Amendment." *Walder* v. *United States*, 347 U. S. 62, 65 (1954).

Under this rationale, our consistent rule has been that a defendant's testimony is subject to rebuttal by contradicting evidence that otherwise would be excluded. The principle applies to suppressed physical evidence, as in *Walder* itself and *United States* v. *Havens*, 446 U. S. 620 (1980), and to statements obtained in violation of the law, so long as the statements are voluntary and reliable, see *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Harris* v. *New York*, 401 U. S. 222 (1971).

Petitioner argues that the rationale of these cases is confined to "impeachment" of testimony presented by the defendant himself because these cases involve only "impeachment by self-contradiction." Brief for Petitioner 13. The theory, it seems, is that excluded evidence introduced in opposition to the defendant's testimony impeaches by means of the contradiction itself; the substantive truth or falsity of the suppressed evidence is irrelevant. Our cases do not bear this reading. In *Havens*, the defendant was charged as an accomplice in the smuggling of narcotics. A codefendant hid the drugs in a T-shirt constructed with special pockets. The pockets were made of patches cut from another T-shirt found in the defendant's luggage during an illegal search. When the defendant denied having possessed the T-shirts, the cut

T-shirt, which had been excluded at the outset, was admitted as rebuttal evidence. We upheld its admission. See 446 U. S., at 623, 628. There was no "self-contradiction" involved, for the rebuttal of the defendant's testimony could only have been based on the jury's belief in the substantive truth of the fact that the altered T-shirt was used in the smuggling, and that it belonged to the defendant. The same was true in *Walder*, where we upheld the admission of illegally seized heroin from an unrelated investigation to impeach the defendant's statement that he had never possessed the drug. In sum, our cases show that introduction of testimony contrary to excluded but reliable evidence subjects the testimony to rebuttal by that evidence.

I agree with the majority that the resolution of this case depends on a balance of values that informs our exclusionary rule jurisprudence. We weigh the "'likelihood of . . . deterrence against the costs of withholding reliable information from the truth-seeking process.'" *Ante*, at 312, n. 1 (quoting *Illinois* v. *Krull*, *supra*, at 347). The majority adopts a sweeping rule that the testimony of witnesses other than the defendant may never be rebutted with excludable evidence. I cannot draw the line where the majority does.

The interest in protecting the truth-seeking function of the criminal trial is every bit as strong in this case as in our earlier cases that allowed rebuttal with evidence that was inadmissible as part of the prosecution's case in chief. Here a witness who knew the accused well took the stand to testify about the accused's personal appearance. The testimony could be expected to create real doubt in the minds of jurors concerning the eyewitness identifications by persons who did not know the accused. To deprive the jurors of knowledge that statements of the defendant himself revealed the witness' testimony to be false would result in a decision by triers of fact who were not just kept in the dark as to excluded evidence, but positively misled. The potential for harm to the truth-seeking process resulting from the majority's new rule

in fact will be greater than if the defendant himself had testified. It is natural for jurors to be skeptical of self-serving testimony by the defendant. Testimony by a witness said to be independent has the greater potential to deceive. And if a defense witness can present false testimony with impunity, the jurors may find the rest of the prosecution's case suspect, for ineffective and artificial cross-examination will be viewed as a real weakness in the state's case. Jurors will assume that if the prosecution had any proof the statement was false, it would make the proof known. The majority does more than deprive the prosecution of evidence. The state must also suffer the introduction of false testimony and appear to bolster the falsehood by its own silence.

The majority's fear that allowing the jury to know the whole truth will chill defendants from putting on any defense seems to me far too speculative to justify the rule here announced. No restriction on the defense results if rebuttal of testimony by witnesses other than the defendant is confined to the introduction of excludable evidence that is in direct contradiction of the testimony. If mere "tension with the tainted evidence," *ante*, at 315, opened the door to introduction of *all* the evidence subject to suppression, then the majority's fears might be justified. But in this context rebuttal can and should be confined to situations where there is direct conflict, which is to say where, within reason, the witness' testimony and the excluded testimony cannot both be true.[1]

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[1] Defining the proper scope of rebuttal is a task that trial judges can be expected to perform without difficulty, for this type of inquiry is a familiar one. In a different context, for example, Federal Rule of Evidence 801(d)(1) provides that a prior statement under oath is not hearsay if "the statement is . . . inconsistent with the declarant's testimony." Likewise, Rule 613(b) contemplates the admission of extrinsic evidence of a "prior inconsistent statement." Trial judges apply these and similar state rules every day, and general formulations of the principles involved are commonplace. For example, the relevant question has been described as whether two statements "cannot at the same time be true . . . . Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness

Also missing from the majority's analysis is the almost certain knowledge that the testimony immunized from rebuttal is false. The majority's apparent assumption that defense witnesses protected by today's rule have only truthtelling in mind strikes me as far too sanguine to support acceptance of a rule that controls the hard reality of contested criminal trials. The majority expresses the common sense of the matter in saying that presentation of excluded evidence must sometimes be allowed because it "penalizes defendants for committing perjury." *Ante*, at 314.

In some cases, of course, false testimony can result from faulty recollection. But the majority's ironclad rule is one that applies regardless of the witness' motives, and may be misused as a license to perjure. Even if the witness testifies in good faith, the defendant and his lawyer, who offer the testimony, know the facts. Indeed, it is difficult here to imagine the defense attorney's reason for asking Henderson about petitioner's hair color if he did not expect her to cast doubt on the eyewitness identification of petitioner by giving a description of petitioner's hair color contrary to that contained in his own (suppressed) statement.

The suggestion that the threat of a perjury prosecution will provide sufficient deterrence to prevent false testimony, *ante*,

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essential; it is an inconsistency that is required." 3A J. Wigmore, Evidence § 1040 (J. Chadbourn rev. 1970).

The trial court's handling of the rebuttal in this case provides an illustration. There is no suggestion that the trial court considered witness Jewel Henderson's testimony about petitioner's hair color to be a basis for admitting petitioner's other statements about the shootings. Henderson also testified that she was with petitioner at his home on the night of the shooting, and that petitioner had arrived there between 10 and 11 p.m., but that she could not be specific about the time. The State sought to rebut this testimony with petitioner's suppressed statements about the shooting, contending that Henderson's testimony established an alibi for the shooting, which occurred around 11 p.m. The court concluded that no alibi was established and refused to allow introduction of the suppressed statements on rebuttal. The trial court thus refused to introduce excluded evidence on the basis of mere tension with the witness' statement.

at 314 (opinion of BRENNAN, J.); *ante*, at 320–321 (opinion of STEVENS, J.), is not realistic. See generally *Dunn* v. *United States*, 442 U. S. 100, 108 (1979) (describing proof of perjury as "exceptionally difficult"). A heightened proof requirement applies in Illinois and other States, making perjury convictions difficult to sustain. See *People* v. *Alkire*, 321 Ill. 28, 151 N. E. 518 (1926); *People* v. *Harrod*, 140 Ill. App. 3d 96, 488 N. E. 2d 316 (1986). Where testimony presented on behalf of a friend or family member is involved, the threat that a future jury will convict the witness may be an idle one.

The damage to the truth-seeking process caused by the majority's rule is certain to be great whether the testimony is perjured or merely false. In this case there can be little doubt of the falsity, since petitioner's description of his own hair was at issue. And as a general matter the alternative to rebuttal is endorsement of judicial proceedings conducted in reliance on information known to be untrue. Suppressed evidence is likely to consist of either voluntary statements by the defendant himself or physical evidence. Both have a high degree of reliability, and testimony in direct conflict to such evidence most often will represent an attempt to place falsehoods before the jury.[2]

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[2] JUSTICE STEVENS takes exception to the "assumption" that the police officer's recollection of James' statement about his hair was reliable. *Ante*, at 321. But one need hardly be credulous to so describe the officer's testimony. James, it must be remembered, said his hair was previously red and straight just after he emerged from the dryer with curlers still in his hair. Moreover, in cases involving the suppression of physical evidence, which the majority's rule must also govern, the reliability of the suppressed evidence itself will not be in question since the evidence is not testimonial. In any event, the issue here is not credibility. Perhaps a jury in this case would also find reasons to be skeptical of the rebuttal testimony. My point is that the factfinder should be given the chance to do so. This will not happen under the majority's approach, by which, as I have said, the verdict will be delivered by jurors who have been misled.

The suggestion that all this is so far beyond the control of the defendant that he will put on no defense is not supported. As to sympathetic witnesses, such as the family friend here, it should not be too hard to assure the witness does not volunteer testimony in contradiction of the facts. The defendant knows the content of the suppressed evidence. Even in cases where the time for consultation is limited, the defense attorney can take care not to elicit contradicting testimony. And in the case of truly neutral witnesses, or witnesses hostile to the accused, it is hard to see the danger that they will present false testimony for the benefit of the defense.

The majority's concerns may carry greater weight where contradicting testimony is elicited from a defense witness on cross-examination. In that situation there might be a concern that the prosecution would attempt to produce such testimony as the foundation to put excluded evidence before the jury. We have found that possibility insufficient to justify immunity for a defendant's own false testimony on cross-examination. *United States* v. *Havens*, 446 U. S. 620 (1980). As to cross-examination of other witnesses, perhaps a different rule could be justified. Rather than wait for an appropriate case to consider this or similar measures, however, the majority opts for a wooden rule immunizing all defense testimony from rebuttal, without regard to knowledge that the testimony introduced at the behest of the defendant is false or perjured.

I also cannot agree that admission of excluded evidence on rebuttal would lead to the "disregard of . . . constitutional rights," by law enforcement officers, *ante*, at 319, that the majority fears. This argument has been raised in our previous cases in this area of the law. See *Havens*, *supra*, at 633–634 (BRENNAN, J., dissenting); *Hass*, 420 U. S., at 725 (BRENNAN, J., dissenting); *Harris*, 401 U. S., at 232 (BRENNAN, J., dissenting). To date we have rejected it. Now the specter appears premised on an assumption that a single slip of the tongue by any defense witness will open the door to

any suppressed evidence at the prosecutor's disposal. If this were so, the majority's concern that officers would be left with little to lose from conducting an illegal search would be understandable. And the argument might hold more force if, as the majority speculates, *ante*, at 319, police confront the temptation to seize evidence illegally "much if not most of the time" after gathering sufficient evidence to present proof of guilt beyond a reasonable doubt in the case in chief. Again, however, I disagree with the predictions.

It is unrealistic to say that the decision to make an illegal search turns on a precise calculation of the possibilities of rebuttal at some future trial. There is no reason to believe a police officer, unschooled in the law, will assess whether evidence already in his possession would suffice to survive a motion for acquittal following the case in chief. The officer may or may not even know the identity of the ultimate defendant.[3] He certainly will not know anything about potential defense witnesses, much less what the content of their testimony might be. What he will know for certain is that evidence from an illegal search or arrest (which may well be crucial to securing a conviction) will be lost to the case in chief. Our earlier assessments of the marginal deterrent effect are applicable here. "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made un-

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[3] In this case, contrary to the impression conveyed by the majority, *ante*, at 319, n. 8, the arresting officers knew almost nothing of the state of a future prosecution case. The officers did know there were several eyewitnesses to the shooting. But these eyewitnesses had made no identification of any suspect. The officers did not know petitioner's real name or his true appearance, but had sought him out at the beauty parlor on an anonymous tip. They could not know what physical evidence, such as the murder weapon, they might find on petitioner, or might lose to the case in chief as a result of illegal conduct. The suggestion that the officers' calculated assessment of a future trial allowed them to ignore the exclusionary rule finds no support in the record and, in fact, is pure speculation.

available to the prosecution in its case in chief." *Harris*, *supra*, at 225.

In this case, the defense witness, one Jewel Henderson, testified that petitioner's hair was black on the date of the offense. Her statement, perjured or not, should not have been offered to the jurors without giving them the opportunity to consider the unequivocal and contradicting description by the person whose own hair it was. I would allow the introduction of petitioner's statement that his hair was red on the day of the shootings. The result is consistent with our line of cases from *Walder* to *Havens* and compelled by their reasoning.

The prosecution, it is true, did not limit itself to petitioner's description of his hair color. It went beyond this to introduce petitioner's statement that he went to the beauty shop to "change his appearance." App. 11. The prosecutor used this statement to suggest that petitioner had a guilty mind and an intention to evade capture by disguise. This goes beyond what was necessary to rebut Henderson's testimony and raises many of the concerns expressed in the majority opinion. Nonetheless, there was overwhelming evidence of petitioner's guilt in this case, including the testimony of five eyewitnesses. In view of these circumstances, I agree with the Illinois Supreme Court that any error as to the additional statements or the prosecutor's argument had no effect on petitioner's trial and may be considered harmless.

Where the jury is misled by false testimony, otherwise subject to flat contradiction by evidence illegally seized, the protection of the exclusionary rule is "'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" *Havens*, *supra*, at 626 (quoting *Harris*, *supra*, at 226). The perversion is the same where the perjury is by proxy. I would affirm the judgment of the Illinois Supreme Court.

FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88–1400. Argued November 1, 1989—Decided January 10, 1990

Respondents—foreign corporations and sole shareholders of domestic corporations conducting business in California—brought separate suits against petitioner California Franchise Tax Board (Board) and certain of its employees, seeking declaratory and injunctive relief on Foreign Commerce Clause grounds from the Board's method of determining the taxable income of respondents' subsidiaries that is allocable to California. The District Court dismissed the suits, but the Court of Appeals reversed, holding that respondents had alleged injuries sufficiently direct and independent of the injuries to their subsidiaries to confer both Article III and stockholder standing. It also held that respondents' federal actions were not barred by the Tax Injunction Act, which prohibits district courts from enjoining, suspending, or restraining the assessment, levy, or collection of any state tax where a plain, speedy, and efficient remedy may be had in state court.

Held:

1. Respondents have Article III standing. A judicial determination that the Board's accounting method is unconstitutional would prevent the actual financial injury to respondents that would be caused by a tax that illegally reduced the return on their investments in their subsidiaries and lowered the value of their stockholdings. Pp. 335–336.

2. Assuming that respondents have stockholder standing, their actions are nevertheless barred under the Tax Injunction Act. As sole shareholders, respondents have under their direction and control entities that, as actual taxpayers, possess a plain, speedy, and efficient remedy for their claims. Respondents' argument that even if they are treated as effectively having all of their subsidiaries' remedies, they do not have a plain, speedy, and efficient remedy because their subsidiaries would not be permitted to raise a Foreign Commerce Clause challenge to the tax, or at least could not base such a challenge on the allegedly distinct foreign commerce injuries suffered by their parent corporations, is rejected. Respondents have not demonstrated that their remedy is uncertain and thus inadequate to bar federal jurisdiction. Petitioners have represented that in no case currently pending in the state courts is the State claiming that the subsidiaries cannot raise foreign commerce

claims, and no case has been cited in which the state courts have refused to hear similar claims; in fact, there is authority to the contrary. This Court cannot hold the Tax Injunction Act inapplicable on mere speculation. Pp. 336–341.

860 F. 2d 688, reversed.

WHITE, J., delivered the opinion for a unanimous Court.

Timothy G. Laddish, Assistant Attorney General of California, argued the cause for petitioners. With him on the briefs were *John K. Van de Kamp*, Attorney General, and *Patricia Streloff*.

Lawrence A. Salibra II argued the cause for respondents. With him on the brief for respondent Alcan Aluminium Ltd. was *Peter D. Miller*. *James Merle Carter* and *John B. Lowry* filed briefs for respondent Imperial Chemical Industries PLC.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *James T. Jones*, Attorney General of Idaho, *Theodore V. Spangler, Jr.*, Deputy Attorney General, *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, *Frederick D. Cooke, Jr.*, Corporation Counsel of District of Columbia, and *Charles L. Reischel*, Deputy Corporation Counsel, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bower*, Attorney General of Georgia, *Warren Price III*, Attorney General of Hawaii, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *James E. Tierney*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *James M. Shannon*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *John P. Arnold*, Attorney General of New Hampshire, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *Roger A.*

JUSTICE WHITE delivered the opinion of the Court.

This case presents two questions: First, whether a foreign company, sole shareholder of an American subsidiary, has standing to challenge in federal court, on Foreign Commerce Clause grounds, the accounting method by which the State of California determines the locally taxable income of that subsidiary; and second, whether such a federal action for injunctive and declaratory relief is barred by the Tax Injunction Act, 28 U. S. C. § 1341 (1982 ed.). The Court of Appeals for the Seventh Circuit held that the foreign companies involved in this case had alleged injuries sufficiently direct and independent of the injuries to their subsidiaries to confer both Article III and stockholder standing, and that their federal actions were not barred by the Tax Injunction Act or the principle of comity that underlies that Act. 860 F. 2d 688 (1988). We granted certiorari, 490 U. S. 1019 (1989), and conclude that there is an Article III case or controversy, as-

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Tellinghuisen, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles G. Brown*, Attorney General of West Virginia, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; and for the Council of State Governments et al. by *Benna Ruth Solomon*, *Joyce Holmes Benjamin*, *Martin Lobel*, and *James F. Flug*.

Briefs of *amici curiae* urging affirmance were filed for the Member States of the European Communities et al. by *F. Eugene Wirwahn;* for the Government of Canada by *Mr. Wirwahn;* for the Government of the United Kingdom by *Mr. Wirwahn;* for the Committee on State Taxation of the Council of State Chambers of Commerce by *Paul H. Frankel* and *William D. Peltz;* and for the Union of Industrial and Employers' Confederations of Europe et al. by *Alexander Spitzer*.

Briefs of *amici curiae* were filed for the Committee of London and Scottish Bankers by *Joanne M. Garvey* and *Joan K. Irion;* for the Multistate Tax Commission by *Alan H. Friedman* and *Paull Mines;* and for Shell Petroleum N. V. by *John R. Hupper*, *Richard W. Clary*, and *Steward R. Bross, Jr.*

sume that respondents have standing as stockholders, and hold that these actions are barred by the Tax Injunction Act. Accordingly, we reverse.

I

Respondent Alcan Aluminium Limited (Alcan) is a Canadian company and indirect sole shareholder of Alcan Aluminium Corporation (Alcancorp), an Ohio corporation with operations in California. Respondent Imperial Chemical Industries PLC (Imperial) is a British company and indirect sole shareholder of ICI Americas, Inc. (Americas), a Delaware corporation that conducts business in California. This case arises out of two separate lawsuits brought in the District Court for the Northern District of Illinois by Alcan and Imperial against petitioners herein, the Franchise Tax Board of the State of California (Board) and certain of its Chicago employees. Respondents' lawsuits sought declaratory and injunctive relief from the Board's method of determining the taxable income of Alcancorp and Americas allocable to California. Under that method, known as the "unitary business/formula apportionment method," the Board calculates the total earnings of the "unitary business" of which the California taxpayer is a part. It then calculates an allocation fraction for the taxpayer by taking an unweighted average of three ratios: California payroll to total payroll, California property value to total property value, and California sales to total sales. Finally, to obtain the taxpayer's taxable income allocable to California, the Board multiplies the taxpayer's allocation fraction by the total income of the unitary business.

Respondents allege that application of this "unitary tax" to domestic subsidiaries of foreign corporations violates the Foreign Commerce Clause, U. S. Const., Art. I, § 8, cl. 3. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 451 (1979). We expressly left open this issue when we addressed similar claims made by a domestic parent company with foreign subsidiaries. See *Container Corp. of America*

v. *Franchise Tax Bd.*, 463 U. S. 159, 189, n. 26, and 195, n. 32 (1983).

II

The first issue in this case is whether respondents have standing to bring these actions. We have treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations. See *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). We stated the requirements for an Article III case or controversy in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472 (1982):

> "Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976)."

The Seventh Circuit stated that the Board did not seriously contest Article III standing, 860 F. 2d, at 691–692, and ruled that respondents' ownership interests in their domestic subsidiaries alone, considered apart from any direct harms suffered as participants in foreign commerce, gave Alcan and Imperial "'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)." *Id.*, at 692. The Board takes issue with the Seventh Circuit's characterization of its position with respect to Article III standing: "[T]he Board has never accepted the proposition that a shareholder seeking to redress a corporate

injury has standing in the constitutional sense." Brief for Petitioners 20, n. 4. Petitioners emphasize that a plaintiff must show that he *personally* has suffered an actual or threatened injury and question whether a sole shareholder's ownership interest in a corporation is sufficient by itself to satisfy the "injury in fact" requirement of Article III. *Ibid.*

We think that the Court of Appeals was quite right in holding that respondents have Article III standing to challenge the taxes that their wholly owned subsidiaries are required to pay. California's accounting method determines the amount of the taxes assessed against the subsidiaries. If those taxes are higher than the law of the land allows, that method threatens to cause actual financial injury to Alcan and Imperial by illegally reducing the return on their investments in Alcancorp and Americas and by lowering the value of their stockholdings. A judicial determination that the Board's accounting method is unconstitutional under the Foreign Commerce Clause would prevent such injuries. That is all that is required for Article III standing.

The more difficult issue is whether respondents can meet the prudential requirements of the standing doctrine. One of these is the requirement that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, *supra*, at 499. Related to this principle we think is the so-called shareholder standing rule. As the Seventh Circuit observed, the rule is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment. 860 F. 2d, at 693. There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated. Respondents claim to fall within this exception, arguing that they have suffered

direct injuries independent of their status as shareholders of Alcancorp and Americas. Specifically, respondents complain of the burden of complying with California's information demands, the alleged burden of double taxation caused when California taxes foreign affiliate income that is already subject to taxes in other jurisdictions, and the burden on their choice to use an American subsidiary as an instrumentality of foreign commerce. Petitioners insist that respondents' injuries are entirely derivative of their ownership interests in Alcancorp and Americas.

The Seventh Circuit concluded that the compliance costs and double taxation claims did not give respondents stockholder standing because these alleged burdens were better viewed as merely added costs to the subsidiaries, experienced by the foreign parents as a decline in the value of their ownership interests. *Id.*, at 696–697. However, the court reasoned that to focus exclusively on the parents' status as shareholders ignores a second feature of the foreign parent-domestic subsidiary relationship: the subsidiaries are owned as instrumentalities of the foreign commerce of their parents. *Id.*, at 697. The Seventh Circuit stated that the unitary tax diminishes the attractiveness of owning American subsidiaries in comparison with entering into contracts with independent companies as a means of engaging in foreign commerce and concluded: "It is the incidence of the unitary tax, its potential to disfavor a particular mode of foreign participation in the American economy, rather than the magnitude of the costs it imposes that provides the strongest argument for standing." *Ibid.* The Seventh Circuit did not decide the constitutional significance of this threat to foreign commerce under the facts of this case, but decided that in this light, there was a sufficient threat of independent injury to respondents to confer standing on them to maintain their suits.

The Ninth Circuit, in contrast, has held that California's unitary tax does not cause direct or independent harm to a foreign parent of a domestic subsidiary so as to give the

parent standing under the shareholder standing rule. *Shell Petroleum, N. V.* v. *Graves*, 709 F. 2d 593, 595, cert. denied, 464 U. S. 1012 (1983). See also *EMI Ltd.* v. *Bennett*, 738 F. 2d 994, 997 (CA9), cert. denied, 469 U. S. 1073 (1984) (following *Graves*); *Alcan Aluminum Ltd.* v. *Franchise Tax Bd.*, 558 F. Supp. 624, 626–629 (SDNY), aff'd, 742 F. 2d 1430 (CA2 1983), cert. denied, 464 U. S. 1041 (1984).

We need not decide this dispute about respondents' stockholder standing, for assuming that respondents do have such standing, cf. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 479–480 (1976), their federal actions are nevertheless barred under the Tax Injunction Act.

III

The Tax Injunction Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341 (1982 ed.). This provision applies to declaratory as well as injunctive relief. *California* v. *Grace Brethren Church*, 457 U. S. 393, 408 (1982). As explained in *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981) (footnote omitted):

> "The statute 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully* v. *Griffin, Inc.*, 429 U. S. [68, 73 (1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."

To the extent they are available, California's refund procedures constitute a plain, speedy, and efficient remedy. Cf. *Grace Brethren Church*, *supra*, at 417. However, it is undisputed that only Alcancorp and Americas, as the actual tax-

payers, can bring a California state-court challenge to the unitary business/formula apportionment method of calculating their tax. To the Seventh Circuit, this fact was enough to make the Tax Injunction Act inapplicable: "[T]he Act has not been construed so broadly as to bar a nontaxpayer (like the parent companies involved here) who lacks a remedy in state court from bringing suit in federal court on the ground that an affiliated taxpayer possesses adequate state court remedies." 860 F. 2d, at 698. This statement may be true, but we arrive at a different conclusion. As sole shareholders, respondents have total control over Alcancorp and Americas. They can direct in all respects their subsidiaries' pursuit of state-court relief from the unitary tax. Respondents' inability to bring state-court challenges in their own names is not determinative where, as here, they control entities that can bring such challenges. To rule otherwise would be to elevate form over substance. See *South Carolina* v. *Regan*, 465 U. S. 367, 381, n. 19 (1984). We therefore construe the Tax Injunction Act as barring a federal action by a party who has under its direction and control an entity possessing a plain, speedy, and efficient remedy for the controlling party's claims.

Alcan and Imperial contend that even if they are treated as effectively having all of the remedies available to their subsidiaries, they nevertheless do not have a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act because their subsidiaries would not be permitted to raise a Foreign Commerce Clause challenge to California's unitary tax, or at least could not base such a challenge on the allegedly distinct foreign commerce injuries suffered by their parent corporations. According to Imperial: "Americas, unlike Imperial, is not within the class of foreign investors protected by federal foreign commerce policy." Brief for Respondent Imperial 24. Imperial argues the inverse of the shareholder standing rule—a corporation has no standing to raise claims based on injury to its shareholders. *Id.*, at 26.

Alcan contends that civil actions in California must be prosecuted in the name of the real party in interest and that "[i]f the injury is the effective deprivation of the use of a subsidiary as a vehicle for the conduct for *[sic]* foreign commerce, there is but one real party in interest, [Alcan]." Brief for Respondent Alcan 47, n. 24.

Petitioners, however, insist that the California courts would entertain and decide the issues that respondents desire to present. Brief for Petitioners 47–48. They point out that respondents represent that their subsidiaries are instrumentalities of foreign commerce and argue that "it only makes sense" that the subsidiaries, who are the taxpayers, be entitled to complain of any burdens on foreign commerce that would relieve them of the taxes assessed against them. *Id.*, at 48. At oral argument, counsel for petitioners reiterated that position, Tr. of Oral Arg. 5, 12, 15, and informed the Court that, with respect to cases currently pending in the California courts, "in no case is the state claiming that the subsidiaries cannot raise those foreign commerce claims." *Id.*, at 6.

The Board's position is, of course, not binding on the California courts, and a remedy that is uncertain or speculative is not adequate to bar federal jurisdiction, *Rosewell*, *supra*, at 516–517; *Grace Brethren Church*, *supra*, at 414, n. 31. Here, however, respondents have not demonstrated that their remedy is uncertain. Under California law, a taxpayer "claiming that the tax computed and assessed against it under this part is void in whole or in part may bring an action, upon the grounds set forth in its claim for refund . . . ." Cal. Rev. & Tax. Code Ann. § 26102 (West 1979). We have been cited no case in which the California courts refused to hear a claim similar to the claims respondents want made by their subsidiaries, and there is authority to the contrary. In *Mercedes-Benz of North America, Inc.* v. *State Bd. of Equalization*, 127 Cal. App. 3d 871, 874, 179 Cal. Rptr. 758, 760 (1982), hearing denied, Mar. 17, 1982 (Cal. Sup. Ct.),

a California appellate court allowed a domestic subsidiary of a foreign corporation to challenge a tax on the ground that it burdened the foreign parent's election to conduct business through a separately incorporated subsidiary rather than a corporate subdivision. Although we cannot authoritatively determine California law, we agree with the Seventh Circuit that "[respondents] have not given us any convincing reason to doubt that the California courts will entertain Alcancorp's and Americas' foreign commerce clause arguments." 860 F. 2d, at 691. Respondents cannot therefore escape the prohibitions of the Tax Injunction Act.

Should the California courts refuse to permit the subsidiaries to raise the contentions that the parents want heard, the result under the Tax Injunction Act might well be different. At this point, however, we cannot hold the Act inapplicable on the mere speculation that the California courts will not allow the taxpayer subsidiaries to raise arguments going to the constitutionality of the taxes they are required to pay.

IV

We conclude that these federal actions are barred by the Tax Injunction Act. The judgment of the Seventh Circuit is therefore reversed.

It is so ordered.

DOWLING *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-6025. Argued October 4, 1989—Decided January 10, 1990

Petitioner Dowling was convicted of robbing a Virgin Islands bank while wearing a ski mask and carrying a small pistol. Relying on Federal Rule of Evidence 404(b)—which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence—the Government introduced at trial the testimony of one Henry, who stated that a similarly masked and armed Dowling had been one of two intruders who had entered her home two weeks after the bank robbery. Although Dowling had been acquitted of charges in the Henry case, the Government believed that Henry's description of him strengthened its identification of him as the bank robber and that her testimony linked him to another individual thought to be implicated in the bank robbery. The District Court permitted the introduction of the testimony and twice instructed the jury about Dowling's acquittal and the limited purpose for which the testimony was being admitted. The Court of Appeals affirmed the conviction, ruling that, although the Government was collaterally estopped by the acquittal from offering Henry's testimony at trial and the testimony was inadmissible under the Federal Rules of Evidence, its admission was harmless because it was highly probable that the error did not prejudice Dowling. The court declined to apply the more stringent standard of *Chapman* v. *California*, 386 U. S. 18, 24, applicable to constitutional errors because the District Court's error was evidentiary and not of constitutional dimension.

Held:

1. The admission of the testimony did not violate the collateral-estoppel component of the Double Jeopardy Clause. The collateral-estoppel doctrine prohibits the Government from relitigating an issue of ultimate fact that has been determined by a valid and final judgment, *Ashe* v. *Swenson*, 397 U. S. 436, but does not bar in all circumstances the later use of evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. Here, the prior acquittal did not determine the ultimate issue in the bank robbery case because in the second trial the Government was not required to show beyond a reasonable doubt that Dowling was the man who entered Henry's house. This decision is consistent with other cases where this Court has held that an

acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof, *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 361–362; *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235. Even if the lower burden of proof at the second trial did not serve to avoid the collateral-estoppel component of the Double Jeopardy Clause, Dowling failed to satisfy his burden of demonstrating that the first jury determined that he was not one of the men who entered Henry's home. Pp. 347–352.

2. The introduction of the evidence did not violate the due process test of "fundamental fairness." Especially in light of the trial judge's limiting instructions, the testimony was not fundamentally unfair, since the jury was free to assess the truthfulness and significance of the testimony, since the trial court's authority to exclude potentially prejudicial evidence adequately addresses the possibility that introduction of such evidence will create a risk that the jury will convict a defendant based on inferences drawn from the acquitted conduct, since inconsistent verdicts are constitutionally tolerable, and since the tradition that the Government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding is amply protected by the Double Jeopardy Clause. Pp. 352–354.

855 F. 2d 114, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 354.

Robert L. Tucker argued the cause and filed briefs for petitioner.

Stephen L. Nightingale argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Joseph C. Wyderko*.*

JUSTICE WHITE delivered the opinion of the Court.

At petitioner's trial for various offenses arising out of a bank robbery, testimony was admitted under Rule 404(b) of the Federal Rules of Evidence, relating to an alleged crime

**Steven E. M. Hartz* filed a brief for the National Association of Criminal Lawyers as *amicus curiae* urging reversal.

that the defendant had previously been acquitted of committing. We conclude that neither the Double Jeopardy Clause nor the Due Process Clause barred the use of this testimony.

I

On the afternoon of July 8, 1985, a man wearing a ski mask and armed with a small pistol robbed the First Pennsylvania Bank in Frederiksted, St. Croix, Virgin Islands, taking over $7,000 in cash from a bank teller, approximately $5,000 in cash from a customer, and various personal and travelers' checks. The culprit ran from the bank, scurried around in the street momentarily, and then commandeered a passing taxi van. While driving away from the scene, the robber pulled off his ski mask. An eyewitness, who had slipped out of the bank while the robbery was taking place, saw the maskless man and at trial identified him as petitioner, Reuben Dowling. Other witnesses testified that they had seen Dowling driving the hijacked taxi van outside of Frederiksted shortly after the bank robbery.

Following his arrest, Dowling was charged with the federal crimes of bank robbery, 18 U. S. C. § 2113(a), and armed robbery, § 2113(d), and with various crimes under Virgin Islands law. Dowling pleaded not guilty to all charges. Dowling's first trial ended with a hung jury. He was tried again and convicted, but the Third Circuit reversed this conviction on appeal. *Government of Virgin Islands* v. *Dowling*, 814 F. 2d 134 (1987). After a third trial, Dowling was convicted on most of the counts; the trial judge sentenced him to 70 years' imprisonment.

During petitioner's third trial, the Government, over petitioner's objection, called a woman named Vena Henry to the stand. Ms. Henry testified that a man wearing a knitted mask with cutout eyes and carrying a small handgun had, together with a man named Delroy Christian, entered her home in Frederiksted approximately two weeks after the First Pennsylvania Bank robbery. Ms. Henry testified that

a struggle ensued and that she unmasked the intruder, whom she identified as Dowling. Based on this incident, Dowling had been charged under Virgin Islands law with burglary, attempted robbery, assault, and weapons offenses, but had been acquitted after a trial held before his third trial in the bank robbery case.

The Government assertedly elicited Henry's testimony for two purposes. First, it believed that Henry's description of Dowling as wearing a mask and carrying a gun similar to the mask worn and the gun carried by the robber of the First Pennsylvania Bank strengthened the Government's identification of Dowling as the bank robber. Second, the Government sought to link Dowling with Delroy Christian, the other man who entered Henry's home. The day before the bank robbery, Dowling had borrowed a white Volkswagen from a friend. At Dowling's trial for the First Pennsylvania Bank robbery, a police officer testified that, shortly before the bank robbery, she and her partner had come upon Christian and another man parked in a white Volkswagen in front of the bank with the car door open into the street; Christian was in the backseat. The officers told the two men to close the door, and the men drove away to the north. The police followed the Volkswagen for about a mile and, shortly thereafter, received a radio message that the bank had been robbed. The Government's theory was that Christian and his friend were to drive the getaway car after Dowling robbed the bank.

Before opening statements, the Government disclosed its intention to call Ms. Henry and explained its rationale for doing so, relying on Rule 404(b) of the Federal Rules of Evidence, which provides that evidence of other crimes, wrongs, or acts may be admissible against a defendant for purposes other than character evidence. After a hearing, the District Court characterized the testimony as highly probative circumstantial evidence and ruled that it was admissible under Rule 404(b). App. 24–25. When Henry left the stand, the

District Court instructed the jury that petitioner had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. *Id.*, at 28. The court reiterated that admonition in its final charge to the jury. *Id.*, at 29.

On appeal, the Third Circuit determined that the District Court should not have admitted Henry's testimony, but nevertheless affirmed Dowling's conviction. 855 F. 2d 114 (1988). Relying on its decision in *United States* v. *Keller*, 624 F. 2d 1154 (1980), the court held that petitioner's acquittal of the charges arising out of the incident at Henry's home collaterally estopped the Government from offering evidence of that incident at petitioner's trial for the First Pennsylvania Bank robbery.

Alternatively, the Court of Appeals ruled that the evidence was inadmissible under the Federal Rules of Evidence. The court noted that we had recently held in *Huddleston* v. *United States*, 485 U. S. 681 (1988), that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.*, at 689. The Third Circuit found Henry's testimony inadmissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by a jury, a second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor.'" 855 F. 2d, at 122. The court also relied on Rule 403 of the Federal Rules of Evidence because, in the Third Circuit's opinion, the danger of unfair prejudice outweighed the probative value of Henry's testimony. 855 F. 2d, at 122.

The Third Circuit, however, held that the admission of Henry's testimony was harmless because it was highly probable that the error did not prejudice the petitioner. *Id.*, at 122–124. The Court of Appeals explicitly declined to apply the more stringent standard, see *Chapman* v. *California*, 386 U. S. 18, 24 (1967), applicable to constitutional errors be-

cause, according to the court, the District Court's mistake was merely evidentiary and not of constitutional dimension. 855 F. 2d, at 122–123. Having rejected petitioner's other objections, the court affirmed the conviction. *Id.*, at 124.

Dowling claims that the Third Circuit was wrong when it found that the admission of Henry's testimony did not offend the Constitution and therefore declined to apply the *Chapman* v. *California*, *supra*, harmless-error standard.[1] We granted certiorari to consider Dowling's contention that Henry's testimony was inadmissible under both the Double Jeopardy and the Due Process Clauses of the Fifth Amendment. 489 U. S. 1051 (1989).

II

A

There is no claim here that the acquittal in the case involving Ms. Henry barred further prosecution in the present case. The issue is the inadmissibility of Henry's testimony.

In *Ashe* v. *Swenson*, 397 U. S. 436 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. *Id.*, at 445–446. We defined the collateral-estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443. Ashe's acquittal in the first trial foreclosed the

[1] Dowling does not challenge the holding that the error was harmless under the less strict standard applied by the Court of Appeals.

second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion. See *id.*, at 445.

Dowling contends that, by the same principle, his prior acquittal precluded the Government from introducing into evidence Henry's testimony at the third trial in the bank robbery case. We disagree because, unlike the situation in *Ashe* v. *Swenson*, the prior acquittal did not determine an ultimate issue in the present case. This much Dowling concedes, and we decline to extend *Ashe* v. *Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances, as Dowling would have it, relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

For present purposes, we assume for the sake of argument that Dowling's acquittal established that there was a reasonable doubt as to whether Dowling was the masked man who entered Vena Henry's home with Delroy Christian two weeks after the First Pennsylvania Bank robbery.[2] But to introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the home beyond a reasonable doubt: the Government sought to introduce Henry's testimony under Rule 404(b), and, as mentioned earlier, in *Huddleston* v. *United States*, *supra*, at 689, we held that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Because a jury might

[2] It is not clear from the record that this finding formed the basis for the jury's verdict. See the discussion *infra*, at Part II–B.

reasonably conclude that Dowling was the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite.

Our decision is consistent with other cases where we have held that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. In *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984), for example, we unanimously agreed that a gun owner's acquittal on a charge of dealing firearms without a license did not preclude a subsequent *in rem* forfeiture proceeding against those firearms, even though forfeiture was only appropriate if the jury in the forfeiture proceeding concluded that the defendant had committed the underlying offense. Because the forfeiture action was a civil proceeding, we rejected the defendant's contention that the Government was estopped from relitigating the issue of the defendant's alleged wrongdoing:

> "[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. . . . [T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that [the defendant] was engaged in an unlicensed firearms business. . . . It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel." *Id.*, at 361–362.

In *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235 (1972), it was also held that the Double Jeopardy Clause did not bar a forfeiture action subsequent to acquittal on the underlying offense because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." *Helvering* v. *Mitch-*

ell, 303 U. S. 391, 397 (1938), likewise observed that "[t]he difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."

We thus cannot agree that the Government was constitutionally barred from using Henry's testimony at the bank robbery trial, and for the same reasons we find no merit in the Third Circuit's holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the Government failed to prove violated a criminal law.

B

Even if we agreed with petitioner that the lower burden of proof at the second proceeding does not serve to avoid the collateral-estoppel component of the Double Jeopardy Clause, we agree with the Government that the challenged evidence was nevertheless admissible because Dowling did not demonstrate that his acquittal in his first trial represented a jury determination that he was not one of the men who entered Ms. Henry's home. In *Ashe* v. *Swenson*, we stated that where a previous judgment of acquittal was based on a general verdict, courts must "'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U. S., at 444 (citation omitted). The Courts of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. *United States* v. *Citron*, 853 F. 2d 1055, 1058 (CA2 1988); *United States* v. *Ragins*, 840 F. 2d 1184, 1194 (CA4 1988); *United States* v. *Gentile*, 816 F. 2d 1157, 1162 (CA7 1987); *United States* v. *Baugus*, 761 F. 2d 506, 508 (CA8 1985); *United States* v. *Mock*, 640 F. 2d 629, 631, n. 1 (CA5

1981); *United States* v. *Hewitt*, 663 F. 2d 1381, 1387 (CA11 1981); *United States* v. *Lasky*, 600 F. 2d 765, 769 (CA9), cert. denied, 444 U. S. 979 (1979). We see no reason to depart from the majority rule in this case.[3]

The only clue to the issues in the earlier case was a discussion between the prosecutor, Dowling's attorney, and the District Judge that took place during the District Court's hearing on the admission of Henry's testimony under Rule 404(b). App. 18–25. Arguing against the admission of Henry's testimony, Dowling's lawyer pointed out that Dowling had been acquitted of breaking into Ms. Henry's home. The trial judge, who had also presided at Dowling's first trial, recalled that Dowling "was not acquitted on the issue of identification." *Id.*, at 21. The prosecutor then contended that Dowling had not disputed identity, but rather had claimed that a robbery had not taken place because he and Christian allegedly "merely came to retrieve . . . money from an individual in the house." *Ibid.* The court then made the statement that "Mr. Dowling's presence in the house was not seriously contested in the case but he stated the general defense. Mr. Dowling, I don't think took the stand." *Ibid.*

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[3] Dowling notes that the party introducing evidence carries the burden of demonstrating the evidence's relevance. He argues that this duty, in the context of the collateral-estoppel component of the Double Jeopardy Clause, requires the Government to establish that a previous acquittal did not resolve a question at issue in a second trial. We disagree. Relevancy is a threshold inquiry. That the burden is on the introducing party to establish relevancy does not also require the introducing party to anticipate and rebut possible objections to the offered evidence.

Dowling also suggests that we should place the burden on the Government in this instance because, as opposed to the situation in *Ashe* v. *Swenson*, 397 U. S. 436 (1970), for example, he does not seek to terminate the prosecution but merely hopes to exclude evidence. This is a distinction without a difference. If anything, the equities weigh in the other direction: in this case, Dowling only faces the risk of the introduction of prejudicial evidence, whereas, in *Ashe* v. *Swenson*, the defendant was threatened with an illegitimate conviction.

There are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial. As the record stands, there is nothing at all that persuasively indicates that the question of identity was at issue and was determined in Dowling's favor at the prior trial; at oral argument, Dowling conceded as much. Tr. of Oral Arg. 16. As a result, even if we were to apply the Double Jeopardy Clause to this case, we would conclude that petitioner has failed to satisfy his burden of demonstrating that the first jury concluded that he was not one of the intruders in Ms. Henry's home.

III

Besides arguing that the introduction of Henry's testimony violated the Double Jeopardy Clause, petitioner also contends that the introduction of this evidence was unconstitutional because it failed the due process test of "fundamental fairness." We recognize that the introduction of evidence in circumstances like those involved here has the potential to prejudice the jury or unfairly force the defendant to spend time and money relitigating matters considered at the first trial. The question, however, is whether it is acceptable to deal with the potential for abuse through nonconstitutional sources like the Federal Rules of Evidence,[4] or whether the introduction of this type of evidence is so extremely unfair that its admission violates "fundamental conceptions of justice." *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977).

Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As we observed in *Lovasco*, *supra*, at 790:

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[4] The Third Circuit, as noted above, found Henry's testimony inadmissible under both Rule 404(b) and Rule 403. 855 F. 2d 114, 122 (1988). The United States urges that this was error, but in affirming we need not pass on the validity of the Court of Appeals' judgment in this respect.

> "Judges are not free, in defining 'due process,' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' *Rochin* v. *California*, 342 U. S. 165, 170 (1952). . . . [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), and which define 'the community's sense of fair play and decency,' *Rochin* v. *California*, *supra*, at 173."

Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry's testimony merits this kind of condemnation. Plainly Henry's testimony was at least circumstantially valuable in proving petitioner's guilt.

Petitioner lists four reasons why, according to him, admission of Henry's testimony was fundamentally unfair. First, petitioner suggests that evidence relating to acquitted conduct is inherently unreliable. We disagree: the jury in this case, for example, remained free to assess the truthfulness and the significance of Henry's testimony, and petitioner had the opportunity to refute it. Second, Dowling contends that the use of this type of evidence creates a constitutionally unacceptable risk that the jury will convict the defendant on the basis of inferences drawn from the acquitted conduct; we believe that the trial court's authority to exclude potentially prejudicial evidence adequately addresses this possibility.

Third, petitioner claims that the exclusion of acquitted conduct evidence furthers the desirable goal of consistent jury verdicts. We, however, do not find any inconsistency between Dowling's conviction for the First Pennsylvania Bank robbery and his acquittal on the charge of robbing Ms. Henry for the obvious reason that the jury's verdict in his second trial did not entail any judgment with respect to the offenses charged in his first. In any event, inconsistent verdicts are

constitutionally tolerable. See *Standefer* v. *United States*, 447 U. S. 10, 25 (1980).

Fourth, petitioner argues that the introduction of Henry's testimony in this case contravenes a tradition that the government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding. We acknowledge the tradition, but find it amply protected by the Double Jeopardy Clause. We decline to use the Due Process Clause as a device for extending the double jeopardy protection to cases where it otherwise would not extend.

IV

Because we conclude that the admission of Ms. Henry's testimony was constitutional and the Court of Appeals therefore applied the correct harmless-error standard, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

At petitioner's trial for bank robbery, the prosecutor introduced the testimony of Vena Henry that petitioner had attempted to rob her in her home approximately two weeks after the bank robbery. Petitioner, however, had already been tried in connection with that incident and had been acquitted of burglary, attempted robbery, assault, and weapons offenses. Because the introduction of this testimony effectively forced petitioner to defend against charges for which he had already been acquitted, the doctrine of criminal collateral estoppel grounded in the Double Jeopardy Clause should have prohibited the Government from introducing the testimony. I would reverse the judgment of the Court of Appeals for the Third Circuit and remand for consideration whether the admission of this testimony was harmless error under the standard enunciated in *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Therefore, I respectfully dissent.

I

"The law 'attaches particular significance to an acquittal.'" *United States* v. *DiFrancesco*, 449 U. S. 117, 129 (1980) (quoting *United States* v. *Scott*, 437 U. S. 82, 91 (1978)). The core protection of the Double Jeopardy Clause attaches to an acquittal and prohibits retrial for the "same offense" after an acquittal. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977). Two offenses are considered the "same offense" for double jeopardy purposes unless each offense requires proof of a fact that the other does not. *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). An acquittal on a greater or lesser included offense, for example, bars prosecution on the other offense. *Brown* v. *Ohio*, 432 U. S. 161, 168 (1977). This protection applies even if the acquittal is based on an "egregiously erroneous foundation." *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) *(per curiam); Sanabria* v. *United States*, 437 U. S. 54, 68–69 (1978).

According such significance to an acquittal reflects both an institutional interest in preserving the finality of judgments and a strong public interest in protecting individuals against governmental overreaching. See *Brown* v. *Ohio*, *supra*, at 165 ("Where successive prosecutions are at stake, the [Double Jeopardy Clause] serves 'a constitutional policy of finality for the defendant's benefit'") (quoting *United States* v. *Jorn*, 400 U. S. 470, 479 (1971) (plurality opinion)). The overriding concern is that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant, so that 'even though innocent he may be found guilty.'" *Scott*, *supra*, at 91 (quoting *Green* v. *United States*, 355 U. S. 184, 188 (1957)). The rule also protects a defendant against being compelled "to live in a continuous state of anxiety and insecurity" about whether he will be retried and from the

"embarrassment, expense and ordeal" of an actual reprosecution. *Green*, *supra*, at 187.

These concerns are most clearly implicated when the defendant is retried for the "same offense" after an acquittal. In *Ashe* v. *Swenson*, 397 U. S. 436 (1970), however, the Court significantly expanded the protection to which a defendant is constitutionally entitled after an acquittal by holding that the Double Jeopardy Clause incorporates the doctrine of criminal collateral estoppel. *Id.*, at 445–446. The doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.*, at 443. In a criminal case, collateral estoppel prohibits the Government from relitigating any ultimate facts resolved in the defendant's favor by the prior acquittal. *Id.*, at 445–446. Thus, in addition to being protected against retrial for the "same offense," the defendant is protected against prosecution for an offense that requires proof of a fact found in his favor in a prior proceeding.

The question in this case is whether the criminal collateral-estoppel doctrine should apply when the Government seeks to introduce in a subsequent trial evidence relating to another criminal offense for which the defendant has been acquitted. Before a jury can consider facts relating to another criminal offense as proof of an element of the presently charged offense, the jury must conclude by a preponderance of the evidence "that the act occurred and that the defendant was the actor." *Huddleston* v. *United States*, 485 U. S. 681, 689 (1988). To the extent that the prior acquittal of the other offense determined either of those factual issues in the defendant's favor, the introduction of this evidence imposes on the defendant the burden of relitigating those facts and thereby increases the likelihood of an erroneous conviction on the charged offense. Thus, I would extend the collateral-estoppel doctrine to preclude the Government from introduc-

ing evidence which relies on facts previously determined in the defendant's favor by an acquittal.[1]

The Court refuses to apply the collateral-estoppel doctrine in this case for two reasons. First, it asserts that petitioner failed to carry his burden of proving that the issue on which he sought to foreclose relitigation was decided in his favor by the first acquittal. More importantly, the Court refuses to apply the collateral-estoppel doctrine when facts underlying a prior acquittal are used as evidence of another offense. Both of the Court's conclusions are inconsistent with the purposes of the collateral-estoppel rule.

A

The Court first asserts that petitioner did not prove that the issue on which he sought to foreclose relitigation "was actually decided in the first proceeding." *Ante*, at 350. The Court's summary conclusion that the defendant should bear the burden of proof when invoking the collateral-estoppel doctrine fails to serve the purposes of the doctrine and the Double Jeopardy Clause in general. Since the doctrine serves to protect defendants against governmental overreaching, the Government should bear the burden of proving that the issue it seeks to relitigate was *not* decided in the defendant's favor by the prior acquittal. As we noted in *Ashe*, because criminal verdicts are general verdicts, it is usually difficult to determine the precise route of the jury's reasoning and the basis on which the verdict rests. See 397 U. S., at

[1] The cases often refer to this situation as collateral estoppel with respect to an "evidentiary fact" in order to distinguish it from the situation present in *Ashe* v. *Swenson*, 397 U. S. 436 (1970). See, *e. g.*, *United States* v. *Keller*, 624 F. 2d 1154, 1159 (CA3 1980). In *Ashe*, the prior acquittal determined facts which were a necessary element of the second offense. 397 U. S., at 445–446 (since issue of identity determined in trial for robbery of one victim, collateral estoppel precluded prosecution for robbery of second victim). In this situation, by contrast, the previously litigated facts are introduced only as evidence of an element of another offense.

444. By putting the burden on the defendant to prove what issues were "actually decided," the Court essentially denies the protection of collateral estoppel to those defendants who affirmatively contest more than one issue or who put the Government to its burden of proof with respect to all elements of the offense. This result is inconsistent with our admonition in *Ashe* that an excessively technical approach to collateral estoppel "would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Ibid.* Indeed, forcing defendants to choose between forgoing the protections of the Double Jeopardy Clause and abandoning the defense of a general denial raises grave due process concerns.

Even assuming that petitioner was properly required to bear the burden of proof, I conclude that petitioner carried it in this case. Vena Henry testified that petitioner had entered her home wearing a mask and carrying a gun but that, after a struggle in which she pulled off the mask, he ran away. There is every reason to believe that the jury rested its verdict on the belief that petitioner was not present in the Henry home. Petitioner was charged with such a wide array of offenses relating to the Henry incident that no other conclusion is "rationally conceivable." *Id.*, at 445. For example, if the jury had acquitted petitioner of attempted robbery because he lacked the requisite intent, it would still have found him guilty of a weapons offense. Neither the comments of the trial judge in this trial that petitioner had not "seriously contested" the issue of identity in the Henry trial but had stated a general defense, App. 21, nor the prosecutor's statement in this case that petitioner's codefendant in the Henry trial had admitted being in the house, *ibid.*, provides a sufficient basis on which to conclude that the issue of identity was not resolved in petitioner's

favor by the acquittal.[2] Thus, if collateral estoppel applies to the evidentiary use of facts, the Government should not have been allowed to introduce Henry's testimony.

B

The Court holds, however, that collateral estoppel does not apply when facts previously found in a defendant's favor are later introduced as evidence of a second offense. The Court excepts from the normal rule of criminal collateral estoppel those situations when the jury can consider the facts under a lower standard of proof in the second proceeding than in the first trial. The Court endorses this exception without any consideration of the purposes underlying the collateral-estoppel doctrine; it is not surprising that the Court's holding reflects an unrealistic view of the risks and burdens imposed on the defendant when facts relating to a prior offense for which he has been acquitted are introduced in a subsequent criminal proceeding.

As the Court notes, we have held that an acquittal in a criminal case does not bar subsequent civil forfeiture actions for the same transaction because the acquittal "merely

[2] In fact, in this case, the acquittal alone should have been sufficient to estop the Government from introducing the Henry evidence. Henry's testimony was introduced not as direct proof but as circumstantial evidence that petitioner was also the masked bank robber, because the mask worn by the intruder in Henry's home was not the same as the mask worn by the bank robber. App. 27. Thus, the jury was invited to infer from the fact that petitioner had allegedly once before worn a different mask and carried a gun that he was the masked bank robber. The jury was instructed that it was to consider the testimony only "to the extent that it helps you in determining the identity of the person who committed the [bank robbery]. . . . Mr. Dowling was found not guilty of the crime of robbery in connection with that." *Id.*, at 29. Nothing in the instructions ensured that the jury did not consider the fact that petitioner had worn a mask and carried a gun *during a prior attempted robbery* as evidence that petitioner was the masked bank robber. Since the acquittal at least determined that petitioner had not committed an attempted robbery, the acquittal should have been enough to preclude the Government from asking the jury to draw that inference.

proves the existence of a reasonable doubt as to [the defendant's] guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 361 (1984); see also *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235 (1972); *Helvering* v. *Mitchell*, 303 U. S. 391, 397 (1938). However, those forfeiture cases involved civil remedial measures rather than criminal punishment. *89 Firearms*, *supra*, at 362–366; *Helvering*, *supra*, at 397–398. We have never before applied such reasoning to a successive criminal prosecution in which the Government seeks to punish the defendant and hinges that punishment at least in part on a criminal act for which the defendant has been acquitted.[3] Indeed, in *Ashe* we indicated to the contrary: "'It is much too late to suggest that [collateral estoppel] is not fully applicable to a former judgment in a criminal case, . . . because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole . . . .'" 397 U. S., at 443 (quoting *United States* v. *Kramer*, 289 F. 2d 909, 913 (CA2 1961)). We have always recognized a distinction between governmental action intended to punish and that which is not, see, *e. g.*, *United States* v. *Halper*, 490 U. S. 435, 446–448 (1989) (Double Jeopardy Clause implicated when civil fine is punitive); *United States* v. *Salerno*, 481 U. S. 739, 746–747 (1987) (upholding Bail Reform Act of 1984 as regulatory rather than punitive measure). Thus, it would be consistent to hold that

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[3] The Government cites *Standefer* v. *United States*, 447 U. S. 10 (1980), as support for its argument that the doctrine of collateral estoppel should not apply to the evidentiary use of facts. In *Standefer*, the Court held that a defendant could not invoke the acquittal of the principal as a bar to his prosecution as an accomplice. *Id.*, at 24. Although the Court noted that collateral estoppel should be applied sparingly against the Government, *id*, at 22–24, the defendant in *Standefer* had not yet been tried. Thus, the concerns which protect a defendant against relitigation were not implicated. When those concerns are implicated, they outweigh any need to apply collateral estoppel cautiously against the Government.

the collateral-estoppel doctrine applies in the criminal (or quasi-criminal) context and not in the civil; when the Government seeks to punish a defendant, the concern for fairness is much more acute.[4]

Whenever a defendant is forced to relitigate the facts underlying a prior offense for which he has been acquitted, there is a risk that the jury erroneously will decide that he is guilty of that offense. That risk is heightened because the jury is required to conclude that the defendant committed the prior offense only by a preponderance of the evidence. Cf. *In re Winship*, 397 U. S. 358, 363 (1970) (reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error"). The fact that the prior offense is used as evidence of the presently charged offense raises concerns about the reliability of the jury's ultimate conclusion that the defendant committed the presently charged offense. These concerns stem in large part from the inherent danger of evidence relating to an extrinsic criminal offense. First, "[o]ne of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrin-

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[4] The higher reasonable-doubt standard is employed in the criminal context to ensure the accuracy of convictions and thereby *protect* defendants, not to permit introduction of evidence of crimes for which the defendant has been acquitted. *In re Winship*, 397 U. S. 358, 363 (1970). By definition, when the Government fails to prove a defendant guilty beyond a reasonable doubt, the defendant is considered legally innocent. Unlike the majority of the Court, I believe that at least with respect to subsequent criminal prosecutions, "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." *State* v. *Wakefield*, 278 N. W. 2d 307, 308 (Minn. 1979). It is ironic that petitioner would have been better off, in his second trial, if he had not been represented by counsel at the first trial and had been convicted because uncounseled convictions may not be used in any capacity in subsequent trials. See *Loper* v. *Beto*, 405 U. S. 473, 483 (1972) (impeachment); *United States* v. *Tucker*, 404 U. S. 443, 447 (1972) (sentencing enhancement); *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967) (substantive evidence).

sic offense. This danger is particularly great where . . . the extrinsic activity was not the subject of a conviction; the jury may feel the defendant should be punished for that activity even if he is not guilty of the offense charged." *United States* v. *Beechum*, 582 F. 2d 898, 914 (CA5 1978) (en banc) (citations omitted). Alternatively, there is the danger that the evidence "may lead [the jury] to conclude that, having committed a crime of the type charged, [the defendant] is likely to repeat it." *Ibid.* Thus, the fact that the defendant is forced to relitigate his participation in a prior criminal offense under a low standard of proof combined with the inherently prejudicial nature of such evidence increases the risk that the jury erroneously will convict the defendant of the presently charged offense.

The Court's only response is that the defendant is free to introduce evidence to rebut the contention that he committed the prior offense. This response, of course, underscores the flaw in the Court's reasoning: introduction of this type of evidence requires the defendant to mount a second defense to an offense for which he has been acquitted. That the facts relating to the prior offense are used only as evidence of another crime does not reduce the burden on the defendant; he is still required to defend against the prior charges. Moreover, because of the significance a jury may place on evidence of a prior criminal offense, presenting a defense against that offense may be as burdensome as defending against the presently charged offense. Finally, since the lower standard of proof makes it easier for the jury to conclude that the defendant committed the prior offense, the defendant is essentially forced to present affirmative evidence to rebut the contention that he committed that offense.[5]

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[5] The fact that the trial judge may instruct the jury that the defendant was acquitted does not sufficiently protect the defendant from the need to present evidence. There is no guarantee that the jury will give any weight to the acquittal; the jury may disregard it or even conclude that the first jury made a mistake.

The Court today adds a powerful new weapon to the Government's arsenal. The ability to relitigate the facts relating to an offense for which the defendant has been acquitted benefits the Government because there are many situations in which the defendant will not be able to present a second defense because of the passage of time, the expense, or some other factor. Indeed there is no discernible limit to the Court's rule; the defendant could be forced to relitigate these facts in trial after trial. Moreover, the Court's reasoning appears to extend even further than the facts of this case and seems to allow a prosecutor to rely on a prior criminal offense (despite an acquittal) as evidence in a trial for an offense which is part of the *same transaction* as the prior offense. For example, a prosecutor could introduce facts relating to a substantive offense as evidence in a trial for conspiracy, *even though* the defendant had been acquitted of the substantive offense. Cf. *Ashe*, 397 U. S., at 445, n. 10 (the question whether collateral estoppel was a constitutional requirement was of little concern until modern statutes gave prosecutors the ability to "spin out a startingly numerous series of offenses from a single alleged criminal transaction"). Indeed, the Court's reasoning could apply even more broadly to justify the introduction of evidence of a prior offense for which the defendant had been acquitted in order to enhance a defendant's sentence under a sentencing scheme that requires proof by less than a reasonable doubt. See, *e. g.*, *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–93 (1986) (upholding constitutionality of sentencing scheme requiring proof of additional facts by preponderance of evidence). Only by ignoring the principles upon which the collateral-estoppel doctrine is based is it possible for the Court to tip the scales this far in the prosecution's favor.

II

The Court's holding today deprives an acquitted defendant of his rightful end to the "blight and suspicious aura which surround an accusation that he is guilty of a specific crime."

Wingate v. *Wainwright*, 464 F. 2d 209, 215 (CA5 1972). Because the Court's holding is based on a hypertechnical view of an acquittal and reflects a naive view of the defendant's burden in a criminal trial, I respectfully dissent.

GUIDRY *v.* SHEET METAL WORKERS NATIONAL PENSION FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88-1105. Argued November 29, 1989—Decided January 17, 1990

Petitioner Guidry, a former official of respondent union and trustee of one of respondent pension plans, pleaded guilty to embezzling funds from the union in violation of § 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Since his union employment had made him eligible for benefits from respondent plans, he filed suit in the District Court against two of the plans when they determined that he had forfeited his right to benefits as a result of his criminal activity. The union intervened, joined the third plan as a party, and stipulated with Guidry to the entry of a money judgment in its favor. The court rejected the funds' contention that Guidry had forfeited his right to benefits. It ruled, however, that a constructive trust in the union's favor should be imposed on Guidry's pension benefits until the judgment was satisfied. Reading the Employee Retirement Income Security Act of 1974 (ERISA) *in pari materia* with, *inter alia*, the LMRDA—which seeks to combat union officials' corruption and to protect membership interests—the court concluded that a narrow exception to ERISA's prohibition on assignment or alienation of pension benefits, § 206(d)(1), is appropriate where "the viability of a union and the members' pension plans was damaged by the knavery of a union official." The Court of Appeals affirmed. Relying on ERISA § 409(a)—which makes a faithless plan fiduciary personally liable for losses to the plan resulting from his breach and subjects him to other appropriate equitable or remedial relief—the court concluded that § 206(d)(1) did not preclude the imposition of the constructive trust, deeming it unlikely that Congress intended to ignore equitable principles by protecting individuals such as Guidry from the consequences of their misconduct.

Held: The constructive trust violates ERISA's prohibition on assignment or alienation of pension benefits. Pp. 371-377.

(a) The constructive trust remedy is prohibited by § 206(d)(1) unless some exception to the general statutory ban is applicable. Cf. *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 836-837. Pp. 371-372.

(b) It is unnecessary to decide whether § 409(a)'s remedial provisions supersede § 206(d)(1)'s bar, since Guidry has not been found to have

breached any fiduciary duty to the pension plans. Although his actions may have harmed the union's members who were fund beneficiaries, he was convicted of stealing money only from the union, and the funds and the union are distinct legal entities. Pp. 372–374.

(c) Assuming that LMRDA § 501 authorizes the imposition of a constructive trust when a union officer has breached his fiduciary duties, that authorization does not override ERISA's anti-alienation provision. Contrary to respondents' argument, the LMRDA will not be modified, impaired, or superseded in violation of ERISA § 514(d)'s saving clause if ERISA pension plans cannot be used to effectuate the LMRDA's remedial goals. A broad reading of § 514(d) would eviscerate § 206(d)'s protections by rendering § 206(d)(1) inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. The two statutes are more persuasively reconciled by holding that the LMRDA determines what sort of judgment the aggrieved party may obtain while ERISA governs the narrow question whether that judgment may be collected through a particular means. Pp. 374–376.

(d) It is also inappropriate to approve any generalized equitable exception to ERISA's anti-alienation provision. The identification of exceptions to the statutory bar is a task for Congress, not the courts. An equitable exception to an antigarnishment rule would be especially problematic, since a restriction on garnishment can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. Pp. 376–377.

856 F. 2d 1457, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and in all but Part II–C of which MARSHALL, J., joined.

Eldon E. Silverman argued the cause for petitioner. With him on the briefs were *Scott Gelman* and *Kenneth T. Eichel.*

Joseph M. Goldhammer argued the cause for respondents. With him on the brief were *Walter C. Brauer III* and *Ellen M. Kelman.**

**Solicitor General Starr, Deputy Solicitor General Shapiro, Christopher J. Wright, Allen H. Feldman, Mary-Helen Mautner,* and *Ellen L. Beard* filed a brief for the United States as *amicus curiae* urging reversal.

JUSTICE BLACKMUN delivered the opinion of the Court.†

Petitioner Curtis Guidry pleaded guilty to embezzling funds from his union. The union obtained a judgment against him for $275,000. The District Court imposed a constructive trust on Guidry's pension benefits, and the United States Court of Appeals for the Tenth Circuit affirmed that judgment. Petitioner contends that the constructive trust violates the statutory prohibition on assignment or alienation of pension benefits imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1982 ed.).[1]

I

From 1964 to 1981, petitioner Guidry was the chief executive officer of respondent Sheet Metal Workers International Association, Local 9 (Union). From 1977 to 1981 he was also a trustee of respondent Sheet Metal Workers Local No. 9 Pension Fund. Petitioner's employment made him eligible to receive benefits from three union pension funds.[2]

In 1981, the Department of Labor reviewed the Union's internal accounting procedures. That review demonstrated that Guidry had embezzled substantial sums of money from the Union. See App. 20. This led to petitioner's resignation. A subsequent audit indicated that over $998,000 was missing. *Id.*, at 26. In 1982, petitioner pleaded guilty to embezzling more than $377,000 from the Union, in violation of § 501(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 536, 29 U. S. C. § 501

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†JUSTICE MARSHALL joins all but Part II–C of this opinion.

[1] Section 206(d)(1), 29 U. S. C. § 1056(d)(1) (1982 ed.), of ERISA states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

[2] In addition to the Local No. 9 Pension Fund, petitioner was eligible to receive benefits from respondent Sheet Metal Workers National Pension Fund and from respondent Sheet Metal Workers Local Unions and Councils Pension Fund.

(c) (1982 ed.).[3] Petitioner began serving a prison sentence. In April 1984, while still incarcerated, petitioner filed a complaint against two of the plans in the United States District Court for the District of Colorado, alleging that the plans had wrongfully refused to pay him the benefits to which he was entitled.[4] The Union intervened, joined the third pension plan as a party, and asserted six claims against petitioner.[5] On the first five claims, petitioner and the Union stipulated to the entry of a $275,000 judgment in the Union's favor. App. 52–58. Petitioner and the Union agreed to litigate the availability of the constructive trust remedy requested in the sixth claim. *Id.*, at 58.

Petitioner previously had negotiated a settlement with the Local No. 9 Pension Fund. *Id.*, at 44–46.[6] The other two

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[3] Section 501(c) provides: "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

[4] The complaint alleged that petitioner was eligible to receive benefits of $577 per month from the Sheet Metal Workers Local Unions and Councils Pension Fund, and $647.51 per month from the Sheet Metal Workers National Pension Fund. App. 5.

[5] The first claim alleged that Guidry had breached his fiduciary duty to the Union in violation of § 501(a) of the LMRDA, 29 U. S. C. § 501(a) (1982 ed.). App. 32–33. The second through fifth claims asserted state common-law claims under theories of conversion, fraud, equitable restitution, and negligence. *Id.*, at 33–35. The sixth claim, asserted against petitioner and the three pension funds, did not set forth a substantive ground for relief. Rather, it asserted that the District Court "must restrain and enjoin the Pension Funds from paying any further pension benefits to Plaintiff Guidry until the completion of this action and thereafter until [the Union] is made whole for its losses." *Id.*, at 35.

[6] The parties stipulated that the Local No. 9 Pension Fund was holding $23,865 in accrued benefits for petitioner. *Id.*, at 45. Under the settlement, the fund agreed to pay petitioner $3,865 in accrued benefits (the remaining $20,000 to go to the fund's insurer) and to resume monthly payments to petitioner as of June 1985. *Id.*, at 46.

plans, however, contended that petitioner had forfeited his right to receive benefits as a result of his criminal misconduct. *Id.*, at 47–50. In the alternative those plans contended that, if petitioner were found to have a right to benefits, those benefits should be paid to the Union rather than to Guidry. *Ibid.*

The District Court therefore was confronted with three different views regarding the disbursement of petitioner's pension benefits. Petitioner contended that the benefits should be paid to him. The two funds argued that the benefits had been forfeited. The Union asserted that the benefits had not been forfeited, but that a constructive trust should be imposed so that the benefits would be paid to the Union rather than to petitioner.

The District Court first rejected the funds' claim that petitioner had forfeited his right to benefits. 641 F. Supp. 360, 362 (Colo. 1986). The court relied on § 203(a) of ERISA, 29 U. S. C. § 1053(a) (1982 ed.), which declares that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable" if the employee meets the statutory age and years of service requirements. 641 F. Supp., at 361–362. The court noted other District Court and Court of Appeals decisions holding that pension benefits were not forfeitable even upon a showing of the covered employee's misconduct. *Id.*, at 362.[7]

The court concluded, however, that the prohibition on assignment or alienation of pension benefits contained in ERISA's § 206(d)(1), 29 U. S. C. § 1056(d)(1) (1982 ed.), did not preclude the imposition of a constructive trust in favor of the Union. The court appeared to recognize that the anti-alienation provision generally prohibits the garnishment of pension benefits as a means of collecting a judgment. The

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[7] The District Court cited *Fremont* v. *McGraw-Edison Co.*, 606 F. 2d 752 (CA7 1979), cert. denied, 445 U. S. 951 (1980); *Winer* v. *Edison Brothers Stores Pension Plan*, 593 F. 2d 307 (CA8 1979); and *Vink* v. *SHV North America Holding Corp.*, 549 F. Supp. 268 (SDNY 1982).

court, nevertheless, stated: "ERISA must be read in pari materia with other important federal labor legislation." 641 F. Supp., at 362. In the Labor Management Relations Act, 1947, 61 Stat. 136, as amended, 29 U. S. C. § 141 *et seq.* (1982 ed.), and in the LMRDA, Congress sought to combat corruption on the part of union officials and to protect the interests of the membership. Viewing these statutes together with ERISA, the District Court concluded: "In circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official, a narrow exception to ERISA's anti-alienation provision is appropriate." 641 F. Supp., at 363. The court therefore ordered that benefits payable to petitioner from all three funds should be held in constructive trust until the Union's judgment and interest thereon were satisfied. *Ibid.*

The United States Court of Appeals for the Tenth Circuit affirmed. 856 F. 2d 1457 (1988). The court concluded that ERISA's anti-alienation provision could not be invoked to protect a dishonest pension plan fiduciary whose breach of duty injured the beneficiaries of the plan. The court deemed it "extremely unlikely that Congress intended to ignore equitable principles by protecting individuals such as [petitioner] from the consequences of their misconduct." *Id.*, at 1460. The court concluded that "the district court's imposition of a constructive trust on [petitioner's] pension benefits both accorded with . . . principles of trust law and was well within its discretionary power as defined by the common law and ERISA." *Id.*, at 1461.[8]

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[8] In the alternative, petitioner contended that, even if ERISA did not bar the imposition of a constructive trust, 75% of his pension benefits should be exempt from garnishment pursuant to § 303 of the Consumer Credit Protection Act, 82 Stat. 163, as amended, 15 U. S. C. § 1673(a). The Court of Appeals rejected that argument on the ground that petitioner had failed to comply with the procedural requirements of the Colorado garnishment laws. 856 F. 2d, at 1463–1464.

Because Courts of Appeals have expressed divergent views concerning the availability of exceptions to ERISA's anti-alienation provision,[9] we granted certiorari, 492 U. S. 904 (1989).

II

Both the District Court and the Court of Appeals presumed that § 206(d)(1) of ERISA erects a general bar to the garnishment of pension benefits from plans covered by the Act. This Court, also, indicated as much, although in dictum, in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825 (1988). In *Mackey* the Court held that ERISA does *not* bar the garnishment of welfare (*e. g.*, vacation) benefits. In reaching that conclusion, it noted that § 206 (d)(1) proscribes the assignment or alienation of *pension* plan benefits, but that no comparable provision applies to ERISA *welfare* benefit plans. *Id.*, at 836. It reasoned that "when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and *not* ERISA welfare benefit plans." *Id.*, at 837 (emphasis in original). The view that the statutory restrictions on assignment or alienation of pension benefits apply to garnishment is consistent with appli-

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[9] Compare *Ellis National Bank of Jacksonville* v. *Irving Trust Co.*, 786 F. 2d 466 (CA2 1986) (no exception to § 206(d)(1) to obtain relief for employee's criminal misconduct); *United Metal Products Corp.* v. *National Bank of Detroit*, 811 F. 2d 297 (CA6 1987) (same), cert. dism'd, 485 U. S. 1017 (1988), with *St. Paul Fire & Marine Ins. Co.* v. *Cox*, 752 F. 2d 550, 552 (CA11 1985) ("[G]arnishment undertaken to satisfy liabilities arising from criminal misconduct toward an employer constitutes an exception to the non-alienability provisions of ERISA"). See also *Crawford* v. *La Boucherie Bernard Ltd.*, 259 U. S. App. D. C. 279, 815 F. 2d 117 (recognizing exception to anti-alienation provision when trustee defrauds the pension plan), cert. denied *sub nom. Goldstein* v. *Crawford*, 484 U. S. 943 (1987).

cable administrative regulations,[10] with the relevant legislative history,[11] and with the views of other federal courts.[12] It is also consonant with other statutory provisions designed to safeguard retirement income.[13] We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case. That remedy is therefore prohibited by § 206(d)(1) unless some exception to the general statutory ban is applicable.

A

The Court of Appeals, in holding that "the district court's use of a constructive trust to redress breaches of ERISA was proper," 856 F. 2d, at 1460, indicated that an exception to the anti-alienation provision can be made when a pension plan fiduciary breaches a duty owed to the plan itself. The court

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[10] Treasury Department regulations state that for tax purposes "a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 CFR § 1.401(a)–13(b)(1) (1989).

[11] The anti-alienation provision permits "any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment." ERISA § 206(d)(2), 29 U. S. C. § 1056(d)(2) (1982 ed.). The Conference Report states: "For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H. R. Conf. Rep. No. 93–1280, p. 280 (1974).

[12] See, *e. g.*, *United Metal Products*, *supra*; *Ellis National Bank*, *supra*; *Tenneco Inc.* v. *First Virginia Bank of Tidewater*, 698 F. 2d 688, 689–690 (CA4 1983). Even courts that have recognized equitable exceptions to the bar on alienation have assumed that § 206(d)(1) operates, as a general matter, to proscribe garnishment of pension benefits. See *St. Paul Fire & Marine*, 752 F. 2d, at 551–552; *Crawford*, 259 U. S. App. D. C., at 283–284, 815 F. 2d, at 121–122.

[13] The garnishment of retirement benefits is prohibited by the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. § 407 (1982 ed.); the Railroad Retirement Act, as amended, 47 Stat. 438, 45 U. S. C. § 231m(a) (1982 ed., Supp. V); the Civil Service Retirement Act, 5 U. S. C. § 8346(a); and the Veterans' Benefits Act, 38 U. S. C. § 3101(a) (1982 ed.).

relied on § 409(a) of ERISA, 29 U. S. C. § 1109(a) (1982 ed.), which provides that a faithless pension plan fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 856 F. 2d, at 1459. We need not decide whether the remedial provisions contained in § 409(a) supersede the bar on alienation in § 206(d)(1), since petitioner has not been found to have breached any fiduciary duty *to the pension plans*. Respondents contend that, due to the nature of petitioner's scheme, there exists continuing uncertainty as to how much money was stolen from the Union and how much was taken from the pension funds.[14] It is clear, however, that petitioner was convicted of stealing money only from the Union. See n. 3, *supra*. Moreover, petitioner has negotiated a settlement with the fund of which he was a fiduciary, and only the Union has a judgment against him. Respondents' argument plays on the natural tendency to blur the distinctions between a fund and its related union (since an injury to either will hurt the union's membership). Respondents, however, cannot avoid the fact that the funds here and the Union are distinct legal entities. (Indeed, at an earlier stage of the litigation these parties took inconsistent positions: the funds argued that petitioner's benefits were subject to forfeiture, while the Union contended that petitioner retained his right to benefits but that the benefits should be placed in constructive trust). Although petitioner's actions may have harmed the Union's members who are the beneficiaries of

[14] One of the ways in which petitioner embezzled was by stealing checks issued by the funds to the Union as payment for clerical services. At oral argument before the District Court, the Union's attorney stated: "Nobody really decided yet whether some of this money was stolen from the union or the pension funds." 3 Record 19, App. to Pet. for Cert. C-13. Counsel also stated, however, that "the trust funds through bonds and other sources of compensation don't have claims against Mr. Guidry anymore, and we do, the union does . . . . The way things shake out, we are holding the bag. We are the ones who lost the money . . . ." *Ibid.*

the funds, petitioner has not been found to have breached any duty to the plans themselves. In our view, therefore, the Court of Appeals erred in invoking § 409(a)'s remedial provisions.

B

Recognizing the problem with the Court of Appeals' approach, respondents, like the District Court, rely principally on the remedial provisions of the LMRDA. Section 501(a), 29 U. S. C. § 501(a) (1982 ed.), of that Act states that a union's officers "occupy positions of trust in relation to such organization and its members as a group" and therefore have a duty "to hold its money and property solely for the benefit of the organization and its members." Section 501(b), 29 U. S. C. § 501(b) (1982 ed.), provides, under certain conditions, a private right of action "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization."[15] We assume, without deciding, that the statutory provision for "other appropriate relief" may authorize, in some circumstances, the imposition of a constructive trust.[16] The question is whether that authorization may

[15] Section 501(c), 29 U. S. C. § 501(c) (1982 ed.), under which petitioner was convicted, establishes criminal penalties for embezzlement or theft by a union officer or employee.

[16] Section 501(b), 29 U. S. C. § 501(b) (1982 ed.), by its terms, does not establish a private right of action for a union itself. Rather, it provides that a suit may be brought in district court by a union *member* when a union officer is alleged to have breached his duties "and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization." That language certainly contemplates that a union may bring suit against its officers in some forum, but it does not expressly provide an independent basis for federal jurisdiction. Courts have reached inconsistent positions on the question whether a union may bring suit under § 501. Compare *Building Material and Dump Truck Drivers, Local 420* v. *Traweek*, 867 F. 2d 500, 506–507 (CA9 1989) (no right of action), with *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *Orr*, 95 LRRM 2701, 2702 (ED

override ERISA's prohibition on the alienation of pension benefits.

Respondents point to § 514(d) of ERISA, 29 U. S. C. § 1144(d) (1982 ed.). It states: "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." In respondents' view, application of ERISA's anti-alienation provision to preclude a remedy that would otherwise be available would "modify, impair or supersede" the LMRDA. We do not believe, however, that the LMRDA will be modified, impaired, or superseded by our refusal to allow ERISA pension plans to be used to effectuate the remedial goals of the LMRDA. Were we to accept respondents' position, ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protections of § 206(d), and we decline to adopt so broad a reading of § 514(d).[17]

It is an elementary tenet of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ." *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). We do

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Tenn. 1977) (union has right of action to allege a violation of § 501). We need not resolve that question here. Rather, we assume, without deciding, that a union may invoke the remedial provisions of § 501(b).

Uncertainty as to the scope of § 501(b) does not call into question the subject-matter jurisdiction of this Court or of the District Court and the Court of Appeals. This suit properly was brought by petitioner under § 502 of ERISA to recover benefits allegedly due him under the pension plans. 29 U. S. C. §§ 1132(a)(1)(B) and 1132(e) (1982 ed.).

[17] Indeed, the LMRDA has its own saving clause. Section 603(a), 29 U. S. C. § 523(a) (1982 ed.), provides that "except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under [any] other Federal law or law of any State." This provision weighs against respondents' contention that the LMRDA's authorization of "other appropriate relief" supersedes ERISA's express proscription of any alienation or assignment of pension benefits.

not believe that congressional intent would be effectuated by reading the LMRDA's general reference to "other appropriate relief" as overriding an express, specific congressional directive that pension benefits not be subject to assignment or alienation. In our view, the two statutes are more persuasively reconciled by holding that the LMRDA determines what sort of *judgment* the aggrieved party may obtain, while ERISA governs the narrow question whether that judgment may be collected through a particular means—a constructive trust placed *on the pension*.

C

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.[18]

As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense

[18] See, for example, § 104(a) of the Retirement Equity Act of 1984, 98 Stat. 1433, 29 U. S. C. § 1056(d)(3) (1982 ed., Supp. V), where Congress mandated that the anti-alienation provision should not apply to a "qualified domestic relations order."

to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear. In addition, as has been noted above, the malefactor often is not the only beneficiary of the pension.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[19]

It is so ordered.

[19] In light of our disposition of petitioner's ERISA claim, we need not address his alternative claim under the Consumer Credit Protection Act.

JIMMY SWAGGART MINISTRIES *v.* BOARD OF EQUALIZATION OF CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 88–1374. Argued October 31, 1989—Decided January 17, 1990

California law requires retailers to pay a 6% sales tax on in-state sales of tangible personal property and to collect from state residents a 6% use tax on such property purchased outside the State. During the tax period in question, appellant religious organization, which is incorporated in Louisiana, sold a variety of religious materials at "evangelistic crusades" within California and made mail-order sales of other such materials to California residents. Appellee State Board of Equalization (Board) audited appellant and advised it that it should register as a seller as required by state law and report and pay sales and use taxes on the aforementioned sales. Appellant paid the taxes and the Board ruled against it on its petitions for redetermination and refund, rejecting its contention that the tax on religious materials violated the First Amendment. The state trial court entered judgment for the Board in appellant's refund suit, the State Court of Appeal affirmed, and the State Supreme Court denied discretionary review.

Held:

1. California's imposition of sales and use tax liability on appellant's sales of religious materials does not contravene the Religion Clauses of the First Amendment. Pp. 384–397.

(a) The collection and payment of the tax imposes no constitutionally significant burden on appellant's religious practices or beliefs under the Free Exercise Clause, which accordingly does not *require* the State to grant appellant a tax exemption. Appellant misreads *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Follett* v. *McCormick*, 321 U. S. 573, which, although holding flat license taxes on commercial sales unconstitutional with regard to the evangelical distribution of religious materials, nevertheless specifically stated that religious activity may constitutionally be subjected to a generally applicable income or property tax akin to the California tax at issue. Those cases apply only where a flat license tax operates as a prior restraint on the free exercise of religious belief. As such, they do not invalidate California's generally applicable sales and use tax, which is not a flat tax, represents only a small fraction of any sale, and applies neutrally to all relevant sales regardless of the nature of the seller or purchaser, so that there is no danger that appel-

lant's religious activity is being singled out for special and burdensome treatment. Moreover, the concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present here, because the statutory registration requirement and the tax itself do not act as prior restraints—no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Furthermore, since appellant argues that the exercise of its beliefs is unconstitutionally burdened by the reduction in its income resulting from the presumably lower demand for its wares (caused by the marginally higher price generated by the tax) and from the costs associated with administering the tax, its free exercise claim is in significant tension with *Hernandez* v. *Commissioner*, 490 U. S. 680, 699, which made clear that, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant because it is no different from that imposed by other generally applicable laws and regulations to which religious organizations must adhere. While a more onerous tax rate than California's, even if generally applicable, might effectively choke off an adherent's religious practices, that situation is not before, or considered by, this Court. Pp. 384–392.

(b) Application of the California tax to appellant's sale of religious materials does not violate the Establishment Clause by fostering an excessive governmental entanglement with religion. The evidence of administrative entanglement is thin, since the Court of Appeal expressly found that, in light of appellant's sophisticated accounting staff and computerized accounting methods, the record did not support its assertion that the collection and payment of the tax impose severe accounting burdens on it. Moreover, although collection and payment will require some contact between appellant and the State, generally applicable administrative and recordkeeping burdens may be imposed on religious organizations without running afoul of the Clause. See, *e. g.*, *Hernandez*, *supra*, at 696–697. The fact that appellant must bear the cost of collecting and remitting the tax—even if the financial burden may vary from religion to religion—does not enmesh the government in religious affairs, since the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. Most significantly, the imposition of the tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing them, since they are subject to the tax regardless of content or motive. Pp. 392–397.

2. The merits of appellant's Commerce Clause and Due Process Clause claim are not properly before, and will not be reached by, this Court, since both the trial court and the Court of Appeal ruled that the claim was procedurally barred because it was not presented to the Board as required by state law. See, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1041–1042. Appellant has failed to substantiate any claim that the California courts in general apply the procedural bar rule and a pertinent exception in an irregular, arbitrary, or inconsistent manner. Pp. 397–399.

204 Cal. App. 3d 1269, 250 Cal. Rptr. 891, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Michael W. McConnell argued the cause for appellant. With him on the brief were *Charles R. Ajalat*, *Edward McGlynn Gaffney, Jr.*, and *Jesse H. Choper*.

Richard E. Nielsen, Deputy Attorney General of California, argued the cause for appellee. With him on the brief were *John K. Van de Kamp*, Attorney General, and *Neal J. Gobar*, Deputy Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether the Religion Clauses of the First Amendment prohibit a State from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization.

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*Briefs of *amici curiae* urging reversal were filed for the Association for Public Justice by *Bradley P. Jacob;* for the Evangelical Council for Financial Accountability et al. by *Samuel E. Ericsson, Michael J. Woodruff*, and *Forest D. Montgomery;* for the International Society for Krishna Consciousness of California, Inc., by *David M. Liberman, Robert C. Moest*, and *Barry A. Fisher;* for the National Council of Churches of Christ in the U. S. A. by *Douglas Laycock;* and for the National Taxpayers Union by *Gale A. Norton*.

Steven R. Shapiro filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld;* and for the Watchtower Bible and Tract Society of New York, Inc., by *James M. McCabe* and *Donald T. Ridley*.

I

California's Sales and Use Tax Law requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail." Cal. Rev. & Tax. Code Ann. § 6051 (West 1987). A "sale" includes any transfer of title or possession of tangible personal property for consideration. Cal. Rev. & Tax. Code Ann. § 6006(a) (West Supp. 1989).

The use tax, as a complement to the sales tax, reaches out-of-state purchases by residents of the State. It is "imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer," § 6201, at the same rate as the sales tax (6 percent). Although the use tax is imposed on the purchaser, § 6202, it is generally collected by the retailer at the time the sale is made. §§ 6202–6206. Neither the State Constitution nor the State Sales and Use Tax Law exempts religious organizations from the sales and use tax, apart from a limited exemption for the serving of meals by religious organizations, § 6363.5.

During the tax period in question (1974 to 1981), appellant Jimmy Swaggart Ministries was a religious organization incorporated as a Louisiana nonprofit corporation and recognized as such by the Internal Revenue Service pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 501(c)(3) (1982 ed.), and by the California State Controller pursuant to the Inheritance Tax and Gift Tax Laws of the State of California. Appellant's constitution and bylaws provide that it "is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God." App. 107. This outreach is to be performed "by all available means, both at home and in foreign lands," and

> "shall specifically include evangelistic crusades; missionary endeavors; radio broadcasting (as owner, broadcaster, and placement agency); television broadcasting (both as owner and broadcaster); and audio production and reproduction of music; audio production and re-

production of preaching; audio production and reproduction of teaching; writing, printing and publishing; and, any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ." *Id.*, at 107–108.

From 1974 to 1981, appellant conducted numerous "evangelistic crusades" in auditoriums and arenas across the country in cooperation with local churches. *Id.*, at 61. During this period, appellant held 23 crusades in California—each lasting 1 to 3 days, with one crusade lasting 6 days—for a total of 52 days. *Id.*, at 19–20. At the crusades, appellant conducted religious services that included preaching and singing. Some of these services were recorded for later sale or broadcast. Appellant also sold religious books, tapes, records, and other religious and nonreligious merchandise at the crusades.

Appellant also published a monthly magazine, "The Evangelist," which was sold nationwide by subscription. The magazine contained articles of a religious nature as well as advertisements for appellant's religious books, tapes, and records. The magazine included an order form listing the various items for sale in the particular issue and their unit price, with spaces for purchasers to fill in the quantity desired and the total price. Appellant also offered its items for sale through radio, television, and cable television broadcasts, including broadcasts through local California stations.

In 1980, appellee Board of Equalization of the State of California (Board) informed appellant that religious materials were not exempt from the sales tax and requested appellant to register as a seller to facilitate reporting and payment of the tax. See Cal. Rev. & Tax. Code Ann. §§ 6066–6074 (West 1987 and Supp. 1989) (tax registration requirements). Appellant responded that it was exempt from such taxes under the First Amendment. In 1981, the Board audited appellant and advised appellant that it should register as a seller and report and pay sales tax on all sales made at its

California crusades. The Board also opined that appellant had a sufficient nexus with the State of California to require appellant to collect and report use tax on its mail-order sales to California purchasers.

Based on the Board's review of appellant's records, the parties stipulated "that [appellant] sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." App. 58. These figures represented the sales and use in California of merchandise with specific religious content—Bibles, Bible study manuals, printed sermons and collections of sermons, audiocassette tapes of sermons, religious books and pamphlets, and religious music in the form of songbooks, tapes, and records. See App. to Juris. Statement B-1 to B-3. Based on the sales figures for appellant's religious materials, the Board notified appellant that it owed sales and use taxes of $118,294.54, plus interest of $36,021.11, and a penalty of $11,829.45, for a total amount due of $166,145.10. App. 8. Appellant did not contest the Board's assessment of tax liability for the sale and use of certain nonreligious merchandise, including such items as "T-shirts with JSM logo, mugs, bowls, plates, replicas of crown of thorns, ark of the covenant, Roman coin, candlesticks, Bible stand, pen and pencil sets, prints of religious scenes, bud vase, and communion cups." *Id.*, at 59–60.

Appellant filed a petition for redetermination with the Board, reiterating its view that the tax on religious materials violated the First Amendment. Following a hearing and an appeal to the Board, the Board deleted the penalty but otherwise redetermined the matter without adjustment in the amount of $118,294.54 in taxes owing, plus $65,043.55 in interest. Pursuant to state procedural law, appellant paid the amount and filed a petition for redetermination and refund with the Board. See Cal. Rev. & Tax. Code Ann. § 6902

(West 1987). The Board denied appellant's petition, and appellant brought suit in state court, seeking a refund of the tax paid.

The trial court entered judgment for the Board, ruling that appellant was not entitled to a refund of any tax. The California Court of Appeal affirmed, 204 Cal. App. 3d 1269, 250 Cal. Rptr. 891 (1988), and the California Supreme Court denied discretionary review. We noted probable jurisdiction pursuant to 28 U. S. C. § 1257(2) (1982 ed.) (amended in 1988), 490 U. S. 1018 (1989), and now affirm.

II

Appellant's central contention is that the State's imposition of sales and use tax liability on its sale of religious materials contravenes the First Amendment's command, made applicable to the States by the Fourteenth Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Appellant challenges the Sales and Use Tax Law under both the Free Exercise and Establishment Clauses.

A

The Free Exercise Clause, we have noted, "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 222–223 (1963). Indeed, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972). Our cases have established that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the

burden." *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989) (citations omitted).

Appellant relies almost exclusively on our decisions in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and *Follett* v. *McCormick*, 321 U. S. 573, 576 (1944), for the proposition that a State may not impose a sales or use tax on the evangelical distribution of religious material by a religious organization. Appellant contends that the State's imposition of use and sales tax liability on it burdens its evangelical distribution of religious materials in a manner identical to the manner in which the evangelists in *Murdock* and *Follett* were burdened.

We reject appellant's expansive reading of *Murdock* and *Follett* as contrary to the decisions themselves. In *Murdock*, we considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee. Reversing the convictions of Jehovah's Witnesses convicted under the ordinance of soliciting and distributing religious literature without a license, we explained:

> "The hand distribution of religious tracts is an age-old form of missionary evangelism . . . [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching in the pulpits." 319 U. S., at 108–109 (footnotes omitted).

Accordingly, we held that "spreading one's religious beliefs or preaching the Gospel through distribution of religious lit-

erature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Id.*, at 110; see also *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943).

We extended *Murdock* the following Term by invalidating, as applied to "one who earns his livelihood as an evangelist or preacher in his home town," an ordinance (similar to that involved in *Murdock*) that required all booksellers to pay a flat fee to procure a license to sell books. *Follett* v. *McCormick*, 321 U. S., at 576. Reaffirming our observation in *Murdock* that "'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment,'" 321 U. S., at 577 (quoting *Murdock*, *supra*, at 112), we reasoned that "[t]he protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker." 321 U. S., at 577.

Our decisions in these cases, however, resulted from the particular nature of the challenged taxes—flat license taxes that operated as a prior restraint on the exercise of religious liberty. In *Murdock*, for instance, we emphasized that the tax at issue was "a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights," 319 U. S., at 113, and cautioned that "[w]e do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Id.*, at 112 (citing *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936)); see also 319 U. S., at 115 ("This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state"). In *Follett*, we reiterated that a preacher is not "free from all financial burdens of government, including taxes on income

or property" and, "like other citizens, may be subject to *general* taxation." 321 U. S., at 578 (emphasis added).

Significantly, we noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct:

> "In all of these cases [in which license taxes have been invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, *it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise.* That is almost uniformly recognized as the inherent vice and evil of this flat license tax." *Murdock*, *supra*, at 113–114 (emphasis added).

See also *Follett*, *supra*, at 577 ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint") (citations omitted). Thus, although *Murdock* and *Follett* establish that appellant's form of religious exercise has "as high a claim to constitutional protection as the more orthodox types," *Murdock*, *supra*, at 110, those cases are of no further help to appellant. Our concern in *Murdock* and *Follett*—that a flat license tax would act as a *precondition* to the free exercise of religious beliefs—is simply not present where a tax applies to all sales and uses of tangible personal property in the State.

Our reading of *Murdock* and *Follett* is confirmed by our decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U. S. 575 (1983), where we con-

sidered a newspaper's First Amendment challenge to a state use tax on ink and paper products used in the production of periodic publications. In the course of striking down the tax, we rejected the newspaper's suggestion, premised on *Murdock* and *Follett*, that a generally applicable sales tax could not be applied to publications. Construing those cases as involving "a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak," 460 U. S., at 587, n. 9 (emphasis in original), we noted:

> "By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Ibid.* (citations omitted).

Accord, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 229 (1987) ("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible").

We also note that just last Term a plurality of the Court rejected the precise argument appellant now makes. In *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989), JUSTICE BRENNAN, writing for three Justices, held that a state sales tax exemption for religious publications violated the Establishment Clause. *Id.*, at 14–21 (plurality opinion). In so concluding, the plurality further held that the Free Exercise Clause did not prevent the State from withdrawing its exemption, noting that "[t]o the extent that our opinions in *Murdock* and *Follett* might be read . . . to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta." *Id.*, at 24. JUSTICE WHITE, concurring in the judgment, con-

cluded that the exemption violated the Free Press Clause because the content of a publication determined its tax-exempt status. *Id.*, at 24–25. JUSTICE BLACKMUN, joined by JUSTICE O'CONNOR, concurred in the plurality's holding that the tax exemption at issue in that case contravened the Establishment Clause, but reserved the question whether "the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day." *Id.*, at 28. In this case, of course, California has not chosen to create a tax exemption for religious materials, and we therefore have no need to revisit the Establishment Clause question presented in *Texas Monthly*.

We do, however, decide the free exercise question left open by JUSTICE BLACKMUN's concurrence in *Texas Monthly* by limiting *Murdock* and *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. As such, *Murdock* and *Follett* plainly do not support appellant's free exercise claim. California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. See *Union League Club* v. *Johnson*, 18 Cal. 2d 275, 278, 115 P. 2d 425, 426 (1941); *People* v. *Imperial County*, 76 Cal. App. 2d 572, 576–577, 173 P. 2d 352, 354 (1946); *Bank of America National Trust & Savings Assn.* v. *State Board of Equalization*, 209 Cal. App. 2d 780, 796–797, 26 Cal. Rptr. 348, 357–358 (1962). Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs *per se;* rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example,

California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

Moreover, our concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present in this case, because the registration requirement, see Cal. Rev. & Tax. Code Ann. §§ 6066–6074 (West 1987 and Supp. 1989), and the tax itself do not act as prior restraints—no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Thus, unlike the license tax in *Murdock*, which was "in no way apportioned" to the "realized revenues" of the itinerant preachers forced to pay the tax, 319 U. S., at 113–114; see also *Texas Monthly*, *supra*, at 22, the tax at issue in this case is akin to a generally applicable income or property tax, which *Murdock* and *Follett* specifically state may constitutionally be imposed on religious activity.

In addition to appellant's misplaced reliance on *Murdock* and *Follett*, appellant's free exercise claim is also in significant tension with the Court's decision last Term in *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989), holding that the Government's disallowance of a tax deduction for religious "auditing" and "training" services did not violate the Free Exercise Clause. *Id.*, at 694–700. The Court reasoned that

> "[a]ny burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the 'contribution or gift' deduction

> would seem to pale by comparison to the overall federal income tax burden on an adherent." *Id.*, at 699.

There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs. California's nondiscriminatory Sales and Use Tax Law requires only that appellant collect the tax from its California purchasers and remit the tax money to the State. The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax. As the Court made clear in *Hernandez*, however, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant. See *ibid.*; *Texas Monthly*, 489 U. S., at 19–20 (plurality opinion); see also *Bob Jones University* v. *United States*, 461 U. S. 574, 603–604 (1983).

Appellant contends that the availability of a deduction (at issue in *Hernandez*) and the imposition of a tax (at issue here) are distinguishable, but in both cases adherents base their claim for an exemption on the argument that an "incrementally larger tax burden interferes with their religious activities." 490 U. S., at 700. It is precisely this argument—rather than one applicable only to deductions—that the Court rejected in *Hernandez*. At bottom, though we do not doubt the economic cost to appellant of complying with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations—such as health and safety regulations—to which appellant must adhere.

Finally, because appellant's religious beliefs do not forbid payment of the sales and use tax, appellant's reliance on *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and its progeny is misplaced, because in no sense has the State "'condition[ed] receipt of an important benefit upon conduct proscribed by a

religious faith, or . . . denie[d] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U. S. 136, 141 (1987) (quoting *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 717–718 (1981)). Appellant has never alleged that the mere act of paying the tax, by itself, violates its sincere religious beliefs.

We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs. The Free Exercise Clause accordingly does not *require* the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, cf. *Murdock*, *supra*, at 115 (the burden of a flat tax could render itinerant evangelism "crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town"), we face no such situation in this case. Accordingly, we intimate no views as to whether such a generally applicable tax might violate the Free Exercise Clause.

B

Appellant also contends that application of the sales and use tax to its sale of religious materials violates the Establishment Clause because it fosters "'an excessive government entanglement with religion,'" *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971) (quoting *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 674 (1970)). Appellant alleges, for example, that the present controversy has featured on-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examinations of appellant's books and records, threats of criminal prosecution, and layers of administrative and judicial proceedings.

The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, *supra*, at 668. The "excessive entanglement" prong of the tripartite purpose-effect-entanglement *Lemon* test, see *Lemon*, 403 U. S., at 612–613, requires examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority," *id.*, at 615; see also *Walz*, 397 U. S., at 695 (separate opinion of Harlan, J.) (warning of "programs, whose very nature is apt to entangle the state in details of administration"). Indeed, in *Walz* we held that a tax exemption for "religious organizations for religious properties used solely for religious worship," as part of a general exemption for nonprofit institutions, *id.*, at 666–667, did not violate the Establishment Clause. In upholding the tax exemption, we specifically noted that taxation of religious properties would cause at least as much administrative entanglement between government and religious authorities as did the exemption:

> "Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes.
>
> "Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.*, at 674–675.

The issue presented, therefore, is whether the imposition of sales and use tax liability in this case on appellant results in "excessive" involvement between appellant and the State and "continuing surveillance leading to an impermissible degree of entanglement."

At the outset, it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. Thus, whatever the precise contours of the Establishment Clause, see *County of Allegheny* v. *American Civil Liberties Union of Pittsburgh*, 492 U. S. 573, 589–594 (1989) (tracing evolution of Establishment Clause doctrine); cf. *Bowen* v. *Kendrick*, 487 U. S. 589, 615–618 (1988) (applying but noting criticism of the entanglement prong of the *Lemon* test), its undisputed core values are not even remotely called into question by the generally applicable tax in this case.

Even applying the "excessive entanglement" prong of the *Lemon* test, however, we hold that California's imposition of sales and use tax liability on appellant threatens no excessive entanglement between church and state. First, we note that the evidence of administrative entanglement in this case is thin. Appellant alleges that collection and payment of the sales and use tax impose severe accounting burdens on it. The Court of Appeal, however, expressly found that the record did not support appellant's factual assertions, noting that appellant "had a sophisticated accounting staff and had recently computerized its accounting and that [appellant] in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' and 'donations.'" 204 Cal. App. 3d, at 1289, 250 Cal. Rptr., at 905.

Second, even assuming that the tax imposes substantial administrative burdens on appellant, such administrative and recordkeeping burdens do not rise to a constitutionally significant level. Collection and payment of the tax will of course require some contact between appellant and the State,

but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the Establishment Clause. See *Hernandez*, 490 U. S., at 696–697 ("[R]outine regulatory interaction [such as application of neutral tax laws] which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, . . . does not of itself violate the nonentanglement command"); *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 305–306 (1985) ("The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, *Lemon*, *supra*, at 614, and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs"). To be sure, we noted in *Tony and Susan Alamo Foundation* that the recordkeeping requirements at issue in that case "appl[ied] only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities," 471 U. S., at 305, but that recognition did not bear on whether the generally applicable regulation was nevertheless "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion," *ibid.*

The fact that appellant must bear the cost of collecting and remitting a generally applicable sales and use tax—even if the financial burden of such costs may vary from religion to religion—does not enmesh government in religious affairs. Contrary to appellant's contentions, the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. There is no "official and continuing surveillance," *Walz*, *supra*, at 675, by government auditors. The sorts of

government entanglement that we have found to violate the Establishment Clause have been far more invasive than the level of contact created by the administration of neutral tax laws. Cf. *Aguilar* v. *Felton*, 473 U. S. 402, 414 (1985); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 126–127 (1982).

Most significantly, the imposition of the sales and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination. Thus, this case stands on firmer ground than *Hernandez*, because appellant offers the items at a stated price, thereby relieving the State of the need to place a monetary value on appellant's religious items. Compare *Hernandez*, 490 U. S., at 697–698 (where no comparable good or service is sold in the marketplace, Internal Revenue Service looks to cost of providing the good or service), with *id.*, at 706 (O'CONNOR, J., dissenting) ("It becomes impossible . . . to compute the 'contribution' portion of a payment to charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts"). Although appellant asserts that donations often accompany payments made for the religious items and that items are sometimes given away without payment (or only nominal payment), it is plain that, in the first case, appellant's use of "order forms" and "price lists" renders illusory any difficulty in separating the two portions and that, in the second case, the question is only whether any particular transfer constitutes a "sale." Ironically, appellant's theory, under which government may not tax "religious core" activities but may tax "nonreligious" activities, would require government to do precisely what appellant asserts the Religion

Clauses prohibit: "determine which expenditures are religious and which are secular." *Lemon*, 403 U. S., at 621–622.

Accordingly, because we find no excessive entanglement between government and religion in this case, we hold that the imposition of sales and use tax liability on appellant does not violate the Establishment Clause.

III

Appellant also contends that the State's imposition of use tax liability on it violates the Commerce and Due Process Clauses because, as an out-of-state distributor, it had an insufficient "nexus" to the State. See *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 554 (1977); *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, 756–760 (1967). We decline to reach the merits of this claim, however, because the courts below ruled that the claim was procedurally barred.

California law provides that an administrative claim for a tax refund "shall state the specific grounds upon which the claim is founded," Cal. Rev. & Tax. Code Ann. § 6904(a) (West Supp. 1989), and that refund suits will be entertained only if "a claim for refund or credit has been duly filed" with the Board, § 6932. Suit may thereafter be brought only "on the grounds set forth in the claim." § 6933. Thus, under state law, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc.* v. *State Board of Equalization*, 170 Cal. App. 3d 665, 672, 216 Cal. Rptr. 267, 271 (1985) (citations omitted). This rule serves a legitimate state interest in requiring parties to exhaust administrative remedies before proceeding to court, for "[s]uch a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Id.*, at 673, 216 Cal. Rptr., at 272.

The record in this case makes clear that appellant, in its refund claim before the Board, failed even to cite the Commerce Clause or the Due Process Clause, much less articulate legal arguments contesting the nexus issue. See App. 34 (incorporating petition for redetermination, which in turn raised only First Amendment arguments, see *id.*, at 11–16). The Board's hearing officer specifically noted, in forwarding his decision to the Board, that appellant's "[c]ounsel does not argue nexus," *id.*, at 22, and indeed the parties stipulated before the trial court that appellant's request for a refund was based on its First Amendment claim, *id.*, at 59. Accordingly, both the trial court and the Court of Appeal declined to rule on the nexus issue on the ground that appellant had failed to raise it in its refund claim before the Board. 204 Cal. App. 3d, at 1290–1292, 250 Cal. Rptr., at 905–906; App. 213. This unambiguous application of state procedural law makes it unnecessary for us to review the asserted claim. See *Michigan* v. *Long*, 463 U. S. 1032, 1041–1042 (1983); *Michigan* v. *Tyler*, 436 U. S. 499, 512, n. 7 (1978).

Appellant nevertheless urges that the state procedural ground relied upon by the courts below is inadequate because the procedural rule is not "'strictly or regularly followed.'" *Hathorn* v. *Lovorn*, 457 U. S. 255, 263 (1982) (quoting *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964)). Appellant asserts that state courts in California retain the authority to hear claims "involving important questions of public policy" notwithstanding the parties' failure to raise those claims before an administrative agency. See *Lindeleaf* v. *Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 870–871, 718 P. 2d 106, 112 (1986); *Hale* v. *Morgan*, 22 Cal. 3d 388, 394, 584 P. 2d 512, 516 (1978). Appellant observes, for example, that although the Court of Appeal in this case found appellant's nexus claim to be procedurally barred, it ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments, see 204 Cal. App. 3d, at 1292–1293, 250 Cal. Rptr., at 907–908, even though those argu-

ments were likewise not raised in appellant's refund claim, see *id.*, at 1292, n. 19, 250 Cal. Rptr., at 907, n. 19.

The Court of Appeal, however, specifically rejected appellant's claim that the nexus issue raised "important questions of public policy," noting that the issue instead "raise[d] factual questions, the determination of which is not a matter of 'public policy' but a matter of evidence." *Id.*, at 1292, 250 Cal. Rptr, at 907. Even if the Court of Appeal erred as a matter of state law in declining to rule on appellant's nexus claim, appellant has failed to substantiate any claim that the California courts in general apply this exception in an irregular, arbitrary, or inconsistent manner. Accordingly, we conclude that appellant's Commerce Clause and Due Process Clause argument is not properly before us. We thus express no opinion on the merits of the claim.

The judgment of the California Court of Appeal is affirmed.

It is so ordered.

W. S. KIRKPATRICK & CO., INC., ET AL. *v.* ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–2066. Argued November 27, 1989—Decided January 17, 1990

According to respondent's complaint, petitioners obtained a construction contract from the Nigerian Government by bribing Nigerian officials. Nigerian law prohibits both the payment and the receipt of such bribes. Respondent, an unsuccessful bidder for the contract, filed an action for damages against petitioners and others under various federal and state statutes. The District Court ruled that the suit was barred by the act of state doctrine, which in its view precluded judicial inquiry into the motivation of a sovereign act that would result in embarrassment to the sovereign, or constitute interference with the conduct of United States foreign policy. The court granted summary judgment for petitioners because resolution of the case in favor of respondent would require imputing to foreign officials an unlawful motivation (the obtaining of bribes), and accordingly might embarrass the Executive Branch in its conduct of foreign relations. The Court of Appeals reversed and remanded the case for trial, holding that on the facts of this case the doctrine did not apply because no embarrassment of the Executive in its conduct of foreign affairs was evident.

Held: The act of state doctrine does not apply because nothing in the present suit requires a court to declare invalid the official act of a foreign sovereign. See, *e. g.*, *Ricaud* v. *American Metal Co.*, 246 U. S. 304. It does not suffice that the facts necessary to establish respondent's claim will also establish that the Nigerian contract was unlawful, since the contract's legality is simply not a question that the District Court *must decide*. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357–358 (Holmes, J.), distinguished. Nor does it suffice that judgment in favor of respondents will require the court to impute to foreign officials improper motivation in the performance of official acts. To say that international comity, respect for the sovereignty of foreign nations, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations are the policies underlying the act of state doctrine is not to say that the doctrine is applicable whenever those policies are implicated. The doctrine is not a rule of abstention which prohibits courts from deciding properly presented cases or controversies simply because the Executive's conduct of foreign relations may be adversely

affected; it is a rule of decision which requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions be deemed valid. Pp. 404–410.

847 F. 2d 1052, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Edward Brodsky argued the cause for petitioners. With him on the briefs was *Sarah S. Gold.*

Thomas B. Rutter argued the cause and filed a brief for respondent.

Deputy Solicitor General Merrill argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Schiffer, Edwin S. Kneedler, Michael Jay Singer, John P. Schnitker,* and *Abraham D. Sofaer.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case we must decide whether the act of state doctrine bars a court in the United States from entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign, but that does require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in the performance of such an official act.

I

The facts as alleged in respondent's complaint are as follows: In 1981, Harry Carpenter, who was then chairman of the board and chief executive officer of petitioner W. S. Kirkpatrick & Co., Inc. (Kirkpatrick), learned that the Republic of Nigeria was interested in contracting for the construction and equipment of an aeromedical center at Kaduna Air Force Base in Nigeria. He made arrangements with Benson "Tunde" Akindele, a Nigerian citizen, whereby

*Briefs of *amici curiae* were filed for the Republic of China by *Daniel K. Mayers, David Westin,* and *Gary B. Born;* and for the American Bar Association by *L. Stanley Chauvin, Jr., Michael D. Sandler,* and *Roger B. Coven.*

Akindele would endeavor to secure the contract for Kirkpatrick. It was agreed that, in the event the contract was awarded to Kirkpatrick, Kirkpatrick would pay to two Panamanian entities controlled by Akindele a "commission" equal to 20% of the contract price, which would in turn be given as a bribe to officials of the Nigerian Government. In accordance with this plan, the contract was awarded to petitioner W. S. Kirkpatrick & Co., International (Kirkpatrick International), a wholly owned subsidiary of Kirkpatrick; Kirkpatrick paid the promised "commission" to the appointed Panamanian entities; and those funds were disbursed as bribes. All parties agree that Nigerian law prohibits both the payment and the receipt of bribes in connection with the award of a government contract.

Respondent Environmental Tectonics Corporation, International, an unsuccessful bidder for the Kaduna contract, learned of the 20% "commission" and brought the matter to the attention of the Nigerian Air Force and the United States Embassy in Lagos. Following an investigation by the Federal Bureau of Investigation, the United States Attorney for the District of New Jersey brought charges against both Kirkpatrick and Carpenter for violations of the Foreign Corrupt Practices Act of 1977, 91 Stat. 1495, as amended, 15 U. S. C. § 78dd–1 *et seq.*, and both pleaded guilty.

Respondent then brought this civil action in the United States District Court for the District of New Jersey against Carpenter, Akindele, petitioners, and others, seeking damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. § 1961 *et seq.*, the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 *et seq.*, and the New Jersey Anti-Racketeering Act, N. J. Stat. Ann. § 2C:41–2 *et seq.* (West 1982). The defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the action was barred by the act of state doctrine.

The District Court, having requested and received a letter expressing the views of the legal adviser to the United States Department of State as to the applicability of the act of state doctrine, treated the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and granted the motion. 659 F. Supp. 1381 (1987). The District Court concluded that the act of state doctrine applies "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." *Id.*, at 1392–1393 (citing *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F. 2d 404, 407 (CA9 1983)). Applying that principle to the facts at hand, the court held that respondent's suit had to be dismissed because in order to prevail respondent would have to show that "the defendants or certain of them intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, ETC would have been awarded the Nigerian Contract." 659 F. Supp., at 1393 (footnote omitted).

The Court of Appeals for the Third Circuit reversed. 847 F. 2d 1052 (1988). Although agreeing with the District Court that "the award of a military procurement contract can be, in certain circumstances, a sufficiently formal expression of a government's public interests to trigger application" of the act of state doctrine, *id.*, at 1058, it found application of the doctrine unwarranted on the facts of this case. The Court of Appeals found particularly persuasive the letter to the District Court from the legal adviser to the Department of State, which had stated that in the opinion of the Department judicial inquiry into the purpose behind the act of a for-

eign sovereign would not produce the "unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid." *Id.*, at 1061. The Court of Appeals acknowledged that "the Department's legal conclusions as to the reach of the act of state doctrine are not controlling on the courts," but concluded that "the Department's factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect." *Id.*, at 1062. In light of the Department's view that the interests of the Executive Branch would not be harmed by prosecution of the action, the Court of Appeals held that Kirkpatrick had not met its burden of showing that the case should not go forward; accordingly, it reversed the judgment of the District Court and remanded the case for trial. *Id.*, at 1067. We granted certiorari, 492 U. S. 905 (1989).

II

This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon "the highest considerations of international comity and expediency," *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303–304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 423 (1964). Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our Execu-

tive Branch accorded sovereign immunity to such acts, see *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 695–706 (1976) (opinion of WHITE, J.); or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals, see *First National City Bank* v. *Banco Nacional de Cuba*, 406 U. S. 759, 768–770 (1972) (opinion of REHNQUIST, J.).

The parties have argued at length about the applicability of these possible exceptions, and, more generally, about whether the purpose of the act of state doctrine would be furthered by its application in this case. We find it unnecessary, however, to pursue those inquiries, since the factual predicate for application of the act of state doctrine does not exist. Nothing in the present suit requires the Court to declare invalid, and thus ineffective as "a rule of decision for the courts of this country," *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 310 (1918), the official act of a foreign sovereign.

In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In *Underhill* v. *Hernandez*, 168 U. S. 250, 254 (1897), holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." In *Oetjen* v. *Central Leather Co.*, *supra*, and in *Ricaud* v. *American Metal Co.*, *supra*, denying title to the party who claimed through purchase from Mexico would have required declaring that government's prior seizure of the property, within its own territory, legally ineffective. See *Oetjen*, *supra*, at 304; *Ricaud*, *supra*, at 310. In *Sabbatino*,

upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void. In the present case, by contrast, neither the claim nor any asserted defense requires a determination that Nigeria's contract with Kirkpatrick International was, or was not, effective.

Petitioners point out, however, that the facts necessary to establish respondent's claim will also establish that the contract was unlawful. Specifically, they note that in order to prevail respondent must prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice. The act of state doctrine is not some vague doctrine of abstention but a "*principle of decision* binding on federal and state courts alike." *Sabbatino*, *supra*, at 427 (emphasis added). As we said in *Ricaud*, "the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country." 246 U. S., at 310. Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. Cf. *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 546 (SDNY 1984) ("The issue in this litigation is not whether [the alleged] acts are valid, but whether they occurred").

In support of their position that the act of state doctrine bars any factual findings that may cast doubt upon the validity of foreign sovereign acts, petitioners cite Justice Holmes' opinion for the Court in *American Banana Co.* v. *United*

Fruit Co., 213 U. S. 347 (1909). That was a suit under the United States antitrust laws, alleging that Costa Rica's seizure of the plaintiff's property had been induced by an unlawful conspiracy. In the course of a lengthy opinion Justice Holmes observed, citing *Underhill*, that "a seizure by a state is not a thing that can be complained of elsewhere in the courts." 213 U. S., at 357–358. The statement is concededly puzzling. *Underhill* does indeed stand for the proposition that a seizure by a state cannot be complained of elsewhere—in the sense of being sought to be declared *ineffective* elsewhere. The plaintiff in *American Banana*, however, like the plaintiff here, was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it. Arguably, then, the statement did imply that suit would not lie if a foreign state's actions would be, though not invalidated, impugned.

Whatever Justice Holmes may have had in mind, his statement lends inadequate support to petitioners' position here, for two reasons. First, it was a brief aside, entirely unnecessary to the decision. *American Banana* was squarely decided on the ground (later substantially overruled, see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704–705 (1962)) that the antitrust laws had no extraterritorial application, so that "what the defendant did in Panama or Costa Rica is not within the scope of the statute." 213 U. S., at 357. Second, whatever support the dictum might provide for petitioners' position is more than overcome by our later holding in *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927). There we held that, *American Banana* notwithstanding, the defendant's actions in obtaining Mexico's enactment of "discriminating legislation" could form part of the basis for suit under the United States antitrust laws. 274 U. S., at 276. Simply put, *American Banana* was not

an act of state case; and whatever it said by way of dictum that might be relevant to the present case has not survived *Sisal Sales*.

Petitioners insist, however, that the policies underlying our act of state cases—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—are implicated in the present case because, as the District Court found, a determination that Nigerian officials demanded and accepted a bribe "would impugn or question the nobility of a foreign nation's motivations," and would "result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States." 659 F. Supp., at 1392–1393. The United States, as *amicus curiae*, favors the same approach to the act of state doctrine, though disagreeing with petitioners as to the outcome it produces in the present case. We should not, the United States urges, "attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act," Brief for United States as *Amicus Curiae* 37, and should eschew "any rigid formula for the resolution of act of state cases generally," *id.*, at 9. In some future case, perhaps, "litigation . . . based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on 'national nerves' that the act of state doctrine or related principles of abstention would appropriately be found to bar the suit," *id.*, at 40 (quoting *Sabbatino*, 376 U. S., at 428), and we should therefore resolve this case on the narrowest possible ground, viz., that the letter from the legal adviser to the District Court gives sufficient indication that, "in the setting of this case," the act of state doctrine poses no bar to adjudication, *ibid.**

*Even if we agreed with the Government's fundamental approach, we would question its characterization of the legal adviser's letter as reflecting the absence of any policy objection to the adjudication. The letter, which

These urgings are deceptively similar to what we said in *Sabbatino*, where we observed that sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application. We suggested that a sort of balancing approach could be applied—the balance shifting against application of the doctrine, for example, if the government that committed the "challenged act of state" is no longer in existence. 376 U. S., at 428. But what is appropriate in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns is not similarly appropriate for the quite opposite purpose of expanding judicial incapacities where such acts are not directly (or even indirectly) involved. It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified "related principles of abstention") into new and uncharted fields.

The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the

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is reprinted as an appendix to the opinion of the Court of Appeals, see 847 F. 2d 1052, 1067–1069 (CA3 1988), did not purport to say whether the State Department would like the suit to proceed, but rather responded (correctly, as we hold today) to the question whether the act of state doctrine was applicable.

present case because the validity of no foreign sovereign act is at issue.

The judgment of the Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

FEDERAL TRADE COMMISSION *v.* SUPERIOR COURT TRIAL LAWYERS ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88–1198. Argued October 30, 1989—Decided January 22, 1990*

A group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases agreed at a meeting of the Superior Court Trial Lawyers Association (SCTLA) to stop providing such representation until the District increased group members' compensation. The boycott had a severe impact on the District's criminal justice system, and the District government capitulated to the lawyers' demands. After the lawyers returned to work, petitioner Federal Trade Commission (FTC) filed a complaint against SCTLA and four of its officers (respondents), alleging that they had entered into a conspiracy to fix prices and to conduct a boycott that constituted unfair methods of competition in violation of § 5 of the FTC Act. Declining to accept the conclusion of the Administrative Law Judge (ALJ) that the complaint should be dismissed, the FTC ruled that the boycott was illegal *per se* and entered an order prohibiting respondents from initiating future such boycotts. The Court of Appeals, although acknowledging that the boycott was a "classic restraint of trade" in violation of § 1 of the Sherman Act, vacated the FTC order. Noting that the boycott was meant to convey a political message to the public, the court concluded that it contained an element of expression warranting First Amendment protection and that, under *United States* v. *O'Brien*, 391 U. S. 367, an incidental restriction on such expression could not be justified unless it was no greater than was essential to an important governmental interest. Reasoning that this test could not be satisfied by the application of an otherwise appropriate *per se* rule, but instead requires the enforcement agency to prove rather than presume that the evil against which the antitrust laws are directed looms in the conduct it condemns, the court remanded for a determination whether respondents possessed "significant market power."

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*Together with No. 88–1393, *Superior Court Trial Lawyers Association et al.* v. *Federal Trade Commission*, also on certiorari to the same court.

Held:

1. Respondents' boycott constituted a horizontal arrangement among competitors that was unquestionably a naked restraint of price and output in violation of the antitrust laws. Respondents' proffered social justifications for the restraint of trade do not make the restraint any less unlawful. Nor is respondents' agreement outside the coverage of the antitrust laws under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, simply because its objective was the enactment of favorable legislation. The *Noerr* doctrine does not extend to horizontal boycotts designed to exact higher prices from the government simply because they are genuinely intended to influence the government to agree to the conspirators' terms. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 503. Pp. 421–425.

2. Respondents' boycott is not immunized from antitrust regulation by *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, which held that the First Amendment prevented a State from prohibiting a politically motivated civil rights boycott. Unlike the boycott upheld in *Claiborne Hardware*, the undenied objective of this boycott was to gain an economic advantage for those who agreed to participate. *Id.*, at 914–915. Pp. 425–428.

3. The Court of Appeals erred in creating a new exception, based on *O'Brien*, *supra*, to the antitrust *per se* liability rules for boycotts having an expressive component. The court's analysis is critically flawed in at least two respects. First, it exaggerates the significance of the "expressive component" in respondents' boycott, since every concerted refusal to do business with a potential customer or supplier has such a component. Thus, a rule requiring courts to apply the antitrust laws "prudently and with sensitivity," in the Court of Appeals' words, whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those laws. Second, the Court of Appeals' analysis denigrates the importance of the rule of law that respondents violated. The court's implicit assumption that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power is in error, since, although the *per se* rules are the product of judicial interpretation of the Sherman Act, they nevertheless have the same force and effect as any other statutory commands. The court also erred in assuming that the categorical antitrust prohibitions are "only" rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power. The *per se* rules reflect a longstanding judgment that every horizontal price-fixing arrangement among competitors poses some threat to the free market even if the par-

ticipants do not themselves have the power to control market prices. Pp. 428–436.

272 U. S. App. D. C. 272, 856 F. 2d 226, reversed in part and remanded.

STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and IV, and the opinion of the Court with respect to Parts V and VI, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 436. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 453.

Ernest J. Isenstadt argued the cause for petitioner in No. 88–1198 and respondent in No. 88–1393. On the briefs were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Boudin*, *Kevin J. Arquit*, *Jay C. Shaffer*, and *Karen G. Bokat*.

Willard K. Tom argued the cause for respondents in No. 88–1198 and petitioners in No. 88–1393. With him on the brief for the Superior Court Trial Lawyers Association were *Donald I. Baker*, *David T. Shelledy*, and *Michael L. Denger*. *Douglas E. Rosenthal* filed a brief for Ralph J. Perrotta et al.†

†Briefs of *amici curiae* urging reversal were filed for the State of South Dakota et al. by *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Jeffrey P. Hallem*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, and *Alison J. Butterfield*, *Douglas B. Baily*, Attorney General of Alaska, and *Richard D. Monkman*, Assistant Attorney General, *Duane Woodard*, Attorney General of Colorado, and *Thomas P. McMahon*, First Assistant Attorney General, *Charles M. Oberly III*, Attorney General of Delaware, and *David G. Culley*, Deputy Attorney General, *Warren Price III*, Attorney General of Hawaii, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *John W. Campbell*, Deputy Attorney General, and *Mark S. Braun*, Assistant Attorney General, *Frederic J. Cowan*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Anne F. Benoit*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Michael F. Brockmeyer* and *Ellen S. Cooper*, Assistant Attorneys General, *Robert M. Spire*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant

JUSTICE STEVENS delivered the opinion of the Court.

Pursuant to a well-publicized plan, a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation. The questions presented are whether the lawyers' concerted conduct violated § 5 of the Federal Trade Commission Act and, if so, whether it was nevertheless protected by the First Amendment to the Constitution.[1]

I

The burden of providing competent counsel to indigent defendants in the District of Columbia is substantial. During 1982, court-appointed counsel represented the defendant in approximately 25,000 cases. In the most serious felony cases, representation was generally provided by full-time employees of the District's Public Defender System (PDS). Less serious felony and misdemeanor cases constituted about

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Attorney General, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, and *Allene D. Evans*, Assistant Attorney General, *Donald J. Hanaway*, Attorney General of Wisconsin, *Mark E. Musolf*, Deputy Attorney General, and *Kevin J. O'Connor* and *Matthew J. Frank*, Assistant Attorneys General; for the American Civil Liberties Union et al. by *Wm. Warfield Ross*, *Gerald P. Norton*, *John A. Powell*, *Arthur B. Spitzer*, and *Elizabeth Symonds;* and for the National Association of Criminal Defense Lawyers by *Rick Harris*.

Briefs of *amici curiae* urging affirmance were filed for the American Medical Association by *Jack R. Bierig* and *Carter G. Phillips;* and for the Washington Council of Lawyers et al. by *Andrew J. Pincus*.

[1] Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45(a)(1), provides:

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

The First Amendment to the Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

85 percent of the total caseload. In these cases, lawyers in private practice were appointed and compensated pursuant to the District of Columbia Criminal Justice Act (CJA).[2]

Although over 1,200 lawyers have registered for CJA appointments, relatively few actually apply for such work on a regular basis. In 1982, most appointments went to approximately 100 lawyers who are described as "CJA regulars." These lawyers derive almost all of their income from representing indigents.[3] In 1982, the total fees paid to CJA lawyers amounted to $4,579,572.

In 1974, the District created a Joint Committee on Judicial Administration with authority to establish rates of compensation for CJA lawyers not exceeding the rates established by the federal Criminal Justice Act of 1964. After 1970, the federal Act provided for fees of $30 per hour for court time and $20 per hour for out-of-court time. See 84 Stat. 916, codified at 18 U. S. C. § 3006A (1970 ed.). These rates accordingly capped the rates payable to the District's CJA lawyers, and could not be exceeded absent amendment to either the federal statute or the District Code.

Bar organizations began as early as 1975 to express concern about the low fees paid to CJA lawyers. Beginning in 1982, respondents, the Superior Court Trial Lawyers Association (SCTLA) and its officers, and other bar groups sought to persuade the District to increase CJA rates to at least $35 per hour. Despite what appeared to be uniform support for the bill, it did not pass. It is also true, however, that noth-

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[2] D. C. Code §§ 11–2601—11–2609 (1981). In a small number of cases, the indigent defendants were represented by third-year law students or private counsel serving without compensation.

[3] As the Administrative Law Judge (ALJ) noted:

"Because of the nature of CJA practice—its long hours away from the office (assuming the CJA lawyer has an office), the deadlines of Superior Court, and the problem of meeting deadlines in other courts—CJA regulars ordinarily do not take civil cases, nor do they usually appear on the criminal side of U. S. District court." *In re Superior Court Trial Lawyers Assn.*, 107 F. T. C. 510, 522, n. 54 (1986).

ing in the record indicates that the low fees caused any actual shortage of CJA lawyers or denied effective representation to defendants.

In early August 1983, in a meeting with officers of SCTLA, the Mayor expressed his sympathy but firmly indicated that no money was available to fund an increase. The events giving rise to this litigation then ensued.

At an SCTLA meeting, the CJA lawyers voted to form a "strike committee." The eight members of that committee promptly met and informally agreed "that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that the boycott should aim for a $45 out-of-court and $55 in-court rate schedule." *In re Superior Court Trial Lawyers Assn.*, 107 F. T. C. 510, 538 (1986).

On August 11, 1983, about 100 CJA lawyers met and resolved not to accept any new cases after September 6 if legislation providing for an increase in their fees had not passed by that date. Immediately following the meeting, they prepared (and most of them signed) a petition stating:

> "We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." 272 U. S. App. D. C. 272, 276, 856 F. 2d 226, 230 (1988).

On September 6, 1983, about 90 percent[4] of the CJA regulars refused to accept any new assignments. Thereafter, SCTLA arranged a series of events to attract the attention of the news media and to obtain additional support. These events were well publicized and did engender favorable editorial comment, but the Administrative Law Judge (ALJ) found that "there is no credible evidence that the District's

[4] The ALJ found that "at most" 13 of the CJA regulars continued to take assignments. 107 F. T. C., at 542, n. 173.

eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure." 107 F. T. C., at 543.[5]

As the participating CJA lawyers had anticipated, their refusal to take new assignments had a severe impact on the District's criminal justice system. The massive flow of new cases did not abate,[6] and the need for prompt investigation and preparation did not ease. As the ALJ found, "there was no one to replace the CJA regulars, and makeshift measures were totally inadequate. A few days after the September 6 deadline, PDS was swamped with cases. The handful of CJA regulars who continued to take cases were soon overloaded. The overall response of the uptown lawyers to the PDS call for help was feeble, reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their underlying support for the demands of the CJA lawyers. Most of the law student volunteers initially observed the boycott, and later all law student volunteers were limited (as they usually are) to a relatively few minor misdemeanors." *Id.*, at 544 (footnotes omitted).

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[5] It is not clear how much of this finding by the ALJ was accepted by the Federal Trade Commission (FTC or Commission). The Court of Appeals suggested that the finding was implicitly rejected by the Commission because not expressly accepted. See 272 U. S. App. D. C. 272, 297, 856 F. 2d 226, 251 (1988). We do not rely upon the finding, and need not decide whether the Commission did indeed reject it. We note, however, that the Commission endorsed findings attributing the District's eventual change of position to a crisis resulting from the lawyers' exercise of power. 107 F. T. C., at 572, and n. 69. Those findings seem to embody the conclusion that the reversal is not attributable to public pressure or publicity.

[6] "During the period from September 6 to September 20, there was a daily average of 63 defendants on the weekday lock-up list and 43 on the Saturday list." *Id.*, at 543, n. 183.

Within 10 days, the key figures in the District's criminal justice system "became convinced that the system was on the brink of collapse because of the refusal of CJA lawyers to take on new cases." *Ibid.* On September 15, they hand-delivered a letter to the Mayor describing why the situation was expected to "reach a crisis point" by early the next week and urging the immediate enactment of a bill increasing all CJA rates to $35 per hour. The Mayor promptly met with members of the strike committee and offered to support an immediate temporary increase to the $35 level as well as a subsequent permanent increase to $45 an hour for out-of-court time and $55 for in-court time.

At noon on September 19, 1983, over 100 CJA lawyers attended an SCTLA meeting and voted to accept the $35 offer and end the boycott. The city council's Judiciary Committee convened at 2 o'clock that afternoon. The committee recommended legislation increasing CJA fees to $35, and the council unanimously passed the bill on September 20. On September 21, the CJA regulars began to accept new assignments and the crisis subsided.

II

The Federal Trade Commission (FTC) filed a complaint against SCTLA and four of its officers (respondents) alleging that they had "entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program." *Id.*, at 511. The complaint alleged that virtually all of the attorneys who regularly compete for or accept new appointments under the CJA program had joined the agreement. The FTC characterized respondents' conduct as "a conspiracy to fix prices and to conduct a boycott" and concluded that they were engaged in "unfair methods of compe-

tition in violation of Section 5 of the Federal Trade Commission Act."[7]

After a 3-week hearing, the ALJ found that the facts alleged in the complaint had been proved, and rejected each of respondents' three legal defenses—that the boycott was adequately justified by the public interest in obtaining better legal representation for indigent defendants; that as a method of petitioning for legislative change it was exempt from the antitrust laws under our decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961); and that it was a form of political action protected by the First Amendment under our decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982). The ALJ nevertheless concluded that the complaint should be dismissed because the District officials, who presumably represented the victim of the boycott, recognized that its net effect was beneficial. The increase in fees would attract more CJA lawyers, enabling them to reduce their caseloads and provide better representation for their clients. "I see no point," he concluded, "in striving resolutely for an antitrust triumph in this sensitive area when the particular case can be disposed of on a more pragmatic basis—there was no harm done." 107 F. T. C., at 561.

The ALJ's pragmatic moderation found no favor with the FTC. Like the ALJ, the FTC rejected each of respondents' defenses. It held that their "coercive, concerted refusal to deal" had the "purpose and effect of raising prices" and was illegal *per se*. *Id.*, at 573. Unlike the ALJ, the FTC refused to conclude that the boycott was harmless, noting that the "boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the re-

[7] Commissioner Pertschuk dissented from the decision to issue a complaint on the ground that it represented an unwise use of the FTC's scarce resources. He did not, however, disagree with the conclusion that a violation of law had been alleged. 107 F. T. C., at 512–513.

spondents. The city must, as a result of the boycott, spend an additional $4 million to $5 million a year to obtain legal services for indigents. We find that these are substantial anticompetitive effects resulting from the respondents' conduct." *Id.*, at 577. Finally, the FTC determined that the record did not support the ALJ's conclusion that the District supported the boycott. The FTC also held that such support would not in any event excuse respondents' antitrust violations. Accordingly, it entered a cease-and-desist order "to prohibit the respondents from initiating another boycott . . . whenever they become dissatisfied with the results or pace of the city's legislative process." *Id.*, at 602.

The Court of Appeals vacated the FTC order and remanded for a determination whether respondents possessed "significant market power." The court began its analysis by recognizing that absent any special First Amendment protection, the boycott "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[8] 272 U. S. App. D. C., at 280, 856 F. 2d, at 234. The Court of Appeals was not persuaded by respondents' reliance on *Claiborne Hardware* or *Noerr*, or by their argument that the boycott was justified because it was designed to improve the quality of representation for indigent defendants. It concluded, however, that "the SCTLA boycott did contain an element of expression warranting First Amendment protection." 272 U. S. App. D. C., at 294, 856 F. 2d, at 248. It

[8] Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousands dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

noted that boycotts have historically been used as a dramatic means of expression and that respondents intended to convey a political message to the public at large. It therefore concluded that under *United States* v. *O'Brien*, 391 U. S. 367 (1968), a restriction on this form of expression could not be justified unless it is no greater than is essential to an important governmental interest. This test, the court reasoned, could not be satisfied by the application of an otherwise appropriate *per se* rule, but instead required the enforcement agency to "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." 272 U. S. App. D. C., at 296, 856 F. 2d, at 250.

Because of our concern about the implications of the Court of Appeals' unique holding, we granted the FTC's petition for certiorari as well as respondents' cross-petition. 490 U. S. 1019 (1989).

We consider first the cross-petition, which contends that respondents' boycott is outside the scope of the Sherman Act or is immunized from antitrust regulation by the First Amendment. We then turn to the FTC's petition.

III

Reasonable lawyers may differ about the wisdom of this enforcement proceeding. The dissent from the decision to file the complaint so demonstrates. So, too, do the creative conclusions of the ALJ and the Court of Appeals. Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, we may also assume that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute. These assumptions do not control the case, for it is

not our task to pass upon the social utility or political wisdom of price-fixing agreements.

As the ALJ, the FTC, and the Court of Appeals all agreed, respondents' boycott "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act." 272 U. S. App. D. C., at 280, 856 F. 2d, at 234. As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act. See *FTC* v. *Cement Institute*, 333 U. S. 683, 694 (1948). Prior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates.[9] The agreement among the

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[9] The FTC found:

"'[T]he city's purchase of CJA legal services for indigents is based on competition. The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition. Indeed, an acknowledgement of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was 'necessary to attract, and retain, competent lawyers.' If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and quality of legal services that it needed.'" 272 U. S. App. D. C., at 278, 856 F. 2d, at 232.

The Court of Appeals agreed with this analysis:

"The Commission correctly determined that the CJA regulars act as 'competitors' in the only sense that matters for antitrust analysis: They are individual business people supplying the same service to a customer, and as such may be capable, through a concerted restriction on output, of forcing that customer to pay a higher price for their service. That the D. C. government, like the buyers of many other services and commodities, prefers to offer a uniform price to all potential suppliers does not alter in any way the anti-competitive potential of the petitioners' boycott. The antitrust laws do not protect only purchasers who negotiate each transaction individually, instead of posting a price at which they will trade with all who come

CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services and, indeed, the only customer in the market for the particular services that CJA regulars offered. "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered." 272 U. S. App. D. C., at 280, 856 F. 2d, at 234. The horizontal arrangement among these competitors was unquestionably a "naked restraint" on price and output. See *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 110 (1984).

It is, of course, true that the city purchases respondents' services because it has a constitutional duty to provide representation to indigent defendants. It is likewise true that the quality of representation may improve when rates are increased. Yet neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade. As we have remarked before, the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978). This judgment "recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."

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forward. Nor should any significance be assigned to the origin of the demand for CJA services; here the District may be compelled by the Sixth Amendment to purchase legal services, there it may be compelled by the voters to purchase street paving services. The reason for the government's demand for a service is simply irrelevant to the issue of whether the suppliers of it have restrained trade by collectively refusing to satisfy it except upon their own terms. We therefore conclude, as did the Commission, that the petitioners engaged in a 'restraint of trade' within the meaning of Section 1." *Id.*, at 281, 856 F. 2d, at 235 (footnote omitted).

Ibid. That is equally so when the quality of legal advocacy, rather than engineering design, is at issue.

The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad." *Ibid.* Respondents' argument, like that made by the petitioners in *Professional Engineers*, ultimately asks us to find that their boycott is permissible because the price it seeks to set is reasonable. But it was settled shortly after the Sherman Act was passed that it "is no excuse that the prices fixed are themselves reasonable. See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397–398 (1927); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 340–341 (1897)." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 647 (1980). Respondents' agreement is not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation.

Our decision in *Noerr* in no way detracts from this conclusion. In *Noerr*, we "considered whether the Sherman Act prohibited a publicity campaign waged by railroads" and "designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers." *Claiborne Hardware*, 458 U. S., at 913. Interpreting the Sherman Act in the light of the First Amendment's Petition Clause, the Court noted that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U. S., at 139–140.

It of course remains true that "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.*, at 135, even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors, *id.*, at 138–140. But in the *Noerr* case the alleged

restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

Indeed, respondents' theory of *Noerr* was largely disposed of by our opinion in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492 (1988). We held that the *Noerr* doctrine does not extend to "every concerted effort that is genuinely intended to influence governmental action." 486 U. S., at 503. We explained:

> "If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia* v. *Pennsylvania R. Co.* 324 U. S. 439, 456–463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia* v. *Evans*, 316 U. S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." *Ibid.*

IV

SCTLA argues that if its conduct would otherwise be prohibited by the Sherman Act and the Federal Trade Commission Act, it is nonetheless protected by the First Amendment rights recognized in *NAACP* v. *Claiborne Hardware Co.*,

458 U. S. 886 (1982). That case arose after black citizens boycotted white merchants in Claiborne County, Mississippi. The white merchants sued under state law to recover losses from the boycott. We found that the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.*, at 914. We accordingly held that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment." *Id.*, at 915.

SCTLA contends that because it, like the boycotters in *Claiborne Hardware*, sought to vindicate constitutional rights, it should enjoy a similar First Amendment protection. It is, of course, clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation—like similar activities in *Claiborne Hardware*—were activities that were fully protected by the First Amendment. But nothing in the FTC's order would curtail such activities, and nothing in the FTC's reasoning condemned any of those activities.

The activity that the FTC order prohibits is a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation; the undenied objective of their boycott was an economic advantage for those who agreed to participate. It is true that the *Claiborne Hardware* case also involved a boycott. That boycott, however, differs in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They sought only the equal respect and equal treatment to which they were constitutionally entitled. They struggled "to change a social order that had consistently treated them as second class citizens." *Id.*, at 912. As we observed, the campaign was not

intended "to destroy legitimate competition." *Id.*, at 914. Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it.

The same cannot be said of attorney's fees. As we recently pointed out, our reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, *supra*, at 508.[10] No matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services. Such an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself. 458 U. S., at 914–915.[11]

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[10] "In *[Claiborne Hardware]* we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, at 914–915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete." *Allied Tube & Conduit Corp.*, 486 U. S., at 508–509.

[11] Respondents contend that, just as the *Claiborne Hardware* boycott sought to secure constitutional rights to equality and freedom, the lawyers' boycott sought to vindicate the Sixth Amendment rights of indigent defendants. *Claiborne Hardware*, however, does not protect every boycott having a constitutional dimension. Indeed, insofar as respondents seek immunity from prosecution on the basis of their good intent, their theory of defense "is merely another variety of an age-old argument." See *United States* v. *Cullen*, 454 F. 2d 386, 392 (CA7 1971). *Claiborne Hardware* does not, and could not, establish a rule immunizing from prosecution any

Only after recognizing the well-settled validity of prohibitions against various economic boycotts did we conclude in *Claiborne Hardware* that "peaceful, political activity such as that found in the [Mississippi] boycott" are entitled to constitutional protection.[12] We reaffirmed the government's "power to regulate [such] economic activity." *Id.*, at 912–913. This conclusion applies with special force when a clear objective of the boycott is to economically advantage the participants.

V

Respondents' concerted action in refusing to accept further CJA assignments until their fees were increased was thus a plain violation of the antitrust laws. The exceptions derived from *Noerr* and *Claiborne Hardware* have no application to respondents' boycott. For these reasons we reject the arguments made by respondents in the cross-petition.

The Court of Appeals, however, crafted a new exception to the *per se* rules, and it is this exception which provoked the

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boycott based upon sincere constitutional concerns. Such an exemption would authorize the government's contractors in nearly all areas to circumvent antitrust law on the basis of their own theory of the government's obligations.

[12] "A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 [(1949)]; *NLRB* v. *Retail Store Employees*, 447 U. S. 607 [(1980)]. The right of business entities to 'associate' to suppress competition may be curtailed. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 [(1978)]. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.' *NLRB* v. *Retail Store Employees*, *supra*, at 617–618 (BLACKMUN, J., concurring in part). See *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212, 222–223, and n. 20 [(1982)]." 458 U. S., at 912.

FTC's petition to this Court. The Court of Appeals derived its exception from *United States* v. *O'Brien*, 391 U. S. 367 (1968). In that case O'Brien had burned his Selective Service registration certificate on the steps of the South Boston Courthouse. He did so before a sizable crowd and with the purpose of advocating his antiwar beliefs. We affirmed his conviction. We held that the governmental interest in regulating the "nonspeech element" of his conduct adequately justified the incidental restriction on First Amendment freedoms.[13] Specifically, we concluded that the statute's incidental restriction on O'Brien's freedom of expression was no greater than necessary to further the Government's interest in requiring registrants to have valid certificates continually available.

However, the Court of Appeals held that, in light of *O'Brien*, the expressive component of respondents' boycott compelled courts to apply the antitrust laws "prudently and with sensitivity," 272 U. S. App. D. C., at 279–280, 856 F. 2d, at 233–234, with a "special solicitude for the First Amendment rights" of respondents. The Court of Appeals concluded that the governmental interest in prohibiting boycotts is not sufficient to justify a restriction on the communicative element of the boycott unless the FTC can prove, and not merely presume, that the boycotters have market power. Because the Court of Appeals imposed this special requirement upon the government, it ruled that *per se* antitrust

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[13] "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377.

analysis was inapplicable to boycotts having an expressive component.

There are at least two critical flaws in the Court of Appeals' antitrust analysis: it exaggerates the significance of the expressive component in respondents' boycott and it denigrates the importance of the rule of law that respondents violated. Implicit in the conclusion of the Court of Appeals are unstated assumptions that most economic boycotts do not have an expressive component, and that the categorical prohibitions against price fixing and boycotts are merely rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power.

It would not much matter to the outcome of this case if these flawed assumptions were sound. *O'Brien* would offer respondents no protection even if their boycott were uniquely expressive and even if the purpose of the *per se* rules were purely that of administrative efficiency. We have recognized that the government's interest in adhering to a uniform rule may sometimes satisfy the *O'Brien* test even if making an exception to the rule in a particular case might cause no serious damage. *United States* v. *Albertini*, 472 U. S. 675, 688 (1985) ("The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests"). The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). If small parties "were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition

into every price-fixing case." R. Bork, The Antitrust Paradox 269 (1978). For these reasons, it is at least possible that the *Claiborne Hardware* doctrine, which itself rests in part upon *O'Brien*,[14] exhausts *O'Brien*'s application to the antitrust statutes.

In any event, however, we cannot accept the Court of Appeals' characterization of this boycott or the antitrust laws. Every concerted refusal to do business with a potential customer or supplier has an expressive component. At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: "[W]e will not do business until you do what we ask." That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott.

At a third level, the boycotters may communicate with third parties to enlist public support for their objectives; to the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy. Some activities, including the boycott here, may be newsworthy precisely for the reasons that they are prohibited: the harms they produce are matters of public concern. Certainly that is no reason for removing the prohibition.

In sum, there is thus nothing unique about the "expressive component" of respondents' boycott. A rule that requires courts to apply the antitrust laws "prudently and with sensitivity" whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those

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[14] See 458 U. S., at 912.

laws. Respondents' boycott thus has no special characteristics meriting an exemption from the *per se* rules of antitrust law.

Equally important is the second error implicit in respondents' claim to immunity from the *per se* rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power.[15] The opinion further assumed that the *per se* rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 272 U. S. App. D. C., at 295, 856 F. 2d, at 249. This statement contains two errors. The *per se*

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[15] In our opinion in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U. S. 2 (1984), we noted that "[t]he rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 350–351 (1982)." *Id.*, at 15–16, n. 25. The Court of Appeals overlooked the words "in part" in that footnote, and also overlooked the statement in text that "there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Id.*, at 16. As the following paragraph from its opinion demonstrates, the Court of Appeals incorrectly assumed that the *per se* rule against price fixing is "only" a rule of administrative convenience:

"The antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power; even the *per se* rule, as the Commission acknowledges in its brief, is only a rule of 'administrative convenience and efficiency,' not a statutory command. FTC Brief at 39; see *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 15 n. 25 (1984). While the rule may occasionally be overinclusive, condemning the ineffectual with the harmful, there is no known danger that socially beneficial arrangements will be prohibited, for price-fixing agreements rarely, if ever, have redeeming virtues. As for the hapless but harmless, as Professor Areeda has noted, defendants charged with conspiring to fix prices 'have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so.' VII P. Areeda, Antitrust Law ¶ 1509 at 411 (1986)." 272 U. S. App. D. C., at 295, 856 F. 2d, at 249.

rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U. S. 2, 16 (1984).

As we explained in *Professional Engineers*, the rule of reason in antitrust law generates

> "two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." 435 U. S., at 692.

"Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 344 (1982).

The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous that a good driver going quickly, but a good driver who obeys the law is safer still.

So it is with boycotts and price fixing.[16] Every such horizontal arrangement among competitors poses some threat to the free market. A small participant in the market is, obviously, less likely to cause persistent damage than a large participant. Other participants in the market may act quickly and effectively to take the small participant's place. For reasons including market inertia and information failures, however, a small conspirator may be able to impede compe-

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[16] "In sum, price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Moreover, toleration implies a burden of continuous supervision for which the courts consider themselves ill-suited. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened. The key points are the first two. Without them, there is no justification for categorical condemnation." 7 P. Areeda, Antitrust Law ¶ 1509, pp. 412–413 (1986).

tition over some period of time.[17] Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors.[18]

As Justice Douglas observed in an oft-quoted footnote to his *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), opinion:

> "Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying pricing policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.*, at 225–226, n. 59.

See also *Maricopa County Medical Society*, 457 U. S., at 351, and n. 23.

Of course, some boycotts and some price-fixing agreements are more pernicious than others; some are only partly successful, and some may only succeed when they are buttressed by other causative factors, such as political influence. But

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[17] Cf. Markovits, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 Texas L. Rev. 41, 80 (1984) (suggesting circumstances in which a firm that lacks market power may nonetheless benefit from anticompetitive tactics).

[18] "Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market." R. Bork, The Antitrust Paradox 269 (1978).

an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless—when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice in the District and when it achieved its economic goal—is flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.

VI

The judgment of the Court of Appeals is accordingly reversed insofar as that court held the *per se* rules inapplicable to the lawyers' boycott.[19] The case is remanded for further proceedings consistent with this opinion.[20]

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that a boycott by the Superior Court Trial Lawyers Association (SCTLA or Trial Lawyers), whose members collectively refused to represent indigent

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[19] In response to JUSTICE BRENNAN's opinion, and particularly to its observation that some concerted arrangements that might be characterized as "group boycotts" may not merit *per se* condemnation, see *post*, at 452, n. 9, we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement—a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades. All of the "group boycott" cases cited in JUSTICE BRENNAN's footnote involved nonprice restraints. There was likewise no price-fixing component in any of the boycotts listed on pages 447–448 of JUSTICE BRENNAN's opinion. Indeed, the text of the opinion virtually ignores the price-fixing component of respondents' concerted action.

[20] On remand, the Court of Appeals should review respondents' objections to the form of the order entered by the Commission. See 272 U. S. App. D. C., at 299, 856 F. 2d, at 253.

criminal defendants without greater compensation, constituted conduct that was neither clearly outside the scope of the Sherman Act nor automatically immunized from antitrust regulation by the First Amendment. With this much I agree.[1] In Part V of its opinion, however, the Court maintains that under the *per se* rule the Federal Trade Commission (FTC or Commission) could find the boycott illegal because it *might* have implicated some of the concerns underlying the antitrust laws. I cannot countenance this reasoning, which upon examination reduces to the Court's assertion that since the government may prohibit airplane stunt flying and reckless automobile driving as categorically harmful, see *ante*, at 433–434, it may also subject expressive political boycotts to a presumption of illegality without even inquiring as to whether they actually cause any of the harms that the antitrust laws are designed to prevent. This non sequitur cannot justify the significant restriction on First Amendment freedoms that the majority's rule entails. Because I believe that the majority's decision is insensitive to the venerable tradition of expressive boycotts as an important means of political communication, I respectfully dissent from Part V of the Court's opinion.

I

The Petition and Free Speech Clauses of the First Amendment guarantee citizens the right to communicate with the government, and when a group persuades the government to adopt a particular policy through the force of its ideas and the power of its message, no antitrust liability can attach. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent*

[1] I join Parts I, II, III, and IV of the Court's opinion, although, as discussed further *infra*, I do not agree that the unreasonableness of the pre-boycott rates of compensation and the fact that the Trial Lawyers enjoyed no other effective means of making themselves heard are irrelevant to the proper analysis. See *ante*, at 421–422.

Control/Coalition for Fair Housing v. *Berkeley*, 454 U. S. 290, 296 (1981). But a group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability.

In any particular case, it may be difficult to untangle these two effects by determining whether political or economic power was brought to bear on the government. The Court of Appeals thoughtfully analyzed this problem and concluded, I believe correctly, that there could be no antitrust violation absent a showing that the boycotters possessed some degree of market power—that is, the ability to raise prices profitably through economic means or, more generally, the capacity to act other than as would an actor in a perfectly competitive market. The court reasoned that "[w]hen the government seeks to regulate an economic boycott with an expressive component . . . its condemnation without proof that the boycott could in fact be anticompetitive ignores the command of [*United States* v.] *O'Brien* that restrictions on activity protected by the First Amendment be *'no greater than is essential'* to preserve competition from the sclerotic effects of combination." 272 U. S. App. D. C. 272, 295, 856 F. 2d 226, 249 (1988) (quoting *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968)) (emphasis in original). The concurring judge added that if the participants wielded no market power, "the boycott must have succeeded out of persuasion and been a political activity." 272 U. S. App. D. C., at 300, 856 F. 2d, at 254 (opinion of Silberman, J.). This approach is quite sensible, and I would affirm the Court of Appeals' decision to remand the case to the FTC for a showing of market power.

A

The issue in this case is *not* whether boycotts may ever be punished under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1), consistent with the First Amendment; rather, the issue is *how* the government may determine *which* boycotts are illegal. Two well-established premises

lead to the ineluctable conclusion that when applying the antitrust laws to a particular expressive boycott, the government may not presume an antitrust violation under the *per se* rule, but must instead apply the more searching, case-specific rule of reason.

First, the *per se* rule is a *presumption* of illegality.[2] As JUSTICE STEVENS has written:

> "The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. *As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency,*

[2] I disagree with the Court that the government's interest in employing the *per se* rule here is a substantial one. The *per se* rule's conceded service of the goals of administrative efficiency and judicial economy cannot justify its application to activity protected by the First Amendment. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988). See also *Schneider* v. *State*, 308 U. S. 147, 161, 164 (1939). Insofar as the *per se* rule is thought warranted by a speculation that even relatively small boycotts or those without market power might nonetheless inflict some measure of economic harm, see *ante*, at 434–436, the rule can be applied in ordinary antitrust cases where First Amendment freedoms are not implicated. In such cases, "'[t]he conceivable social benefits [of the conduct under scrutiny] are few in principle, small in magnitude, [and] speculative in occurrence.'" *Ante*, at 434, n. 16 (quoting 7 P. Areeda, Antitrust Law ¶1509, pp. 412–413 (1986)). But where an expressive boycott is at issue, the same cannot be said; the First Amendment establishes that the social benefits involved are not "small in magnitude" or "speculative in occurrence." Hence, even if it were *possible* that a boycott without market power might cause anticompetitive effects—a dubious proposition, since by definition market power is the ability to alter prices—the government still should be required to proceed under the rule of reason and demonstrate that such effects are actually present in the case *sub judice*.

> *we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 343–344 (1982) (emphasis added; footnotes omitted).

We have freely admitted that conduct condemned under the *per se* rule sometimes would be permissible if subjected merely to rule-of-reason analysis. See *Maricopa*, *supra*, at 344, n. 16; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50, n. 16 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 (1972).

Second, the government may not in a First Amendment case apply a broad presumption that certain categories of speech are harmful without engaging in a more particularized examination.[3] As the Court of Appeals perceptively reasoned, "the evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." 272 U. S. App. D. C., at 296, 856 F. 2d, at 250. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals"; rather, government must ensure that, even when its regulation is not content based, the restriction narrowly "focuses on the source of the evils the [State] seeks to eliminate." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799, and n. 7 (1989). This is

[3] In *United States* v. *O'Brien*, 391 U. S. 367 (1968), the Court held: "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental restrictions on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 376–377.

what it means for a law to be "narrowly tailored" to the State's interest. See *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 478 (1989); *Frisby* v. *Schultz*, 487 U. S. 474, 485 (1988). "Broad prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

In *Speiser* v. *Randall*, 357 U. S. 513 (1958), for example, we invalidated a state program under which taxpayers applying for a certain tax exemption bore the burden of proving that they did not advocate the overthrow of the United States Government. We held that the presumption against the taxpayer was unconstitutional because the State had "no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." *Id.*, at 529. More recently, we determined that the First Amendment prohibits a State from imposing liability on a newspaper for the publication of embarrassing but truthful information based on a "negligence *per se*" theory. See *The Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989). In language applicable to the instant case, we rejected "the broad sweep" of a standard where "liability follows automatically from publication," and we instead required "case-by-case findings" of harm. *Id.*, at 539. Similarly, I would hold in this case that the FTC cannot ignore the particular factual circumstances before it by employing a *presumption* of illegality in the guise of the *per se* rule.

B

The Court's approach today is all the more inappropriate because the success of the Trial Lawyers' boycott could have been attributable to the persuasiveness of its message rather than any coercive economic force. When a boycott seeks to generate public support for the passage of legislation, it may operate on a *political* rather than *economic* level, especially when the government is the target. Here, the demand for lawyers' services under the Criminal Justice Act (CJA) is

created by the command of the Sixth Amendment. How that demand is satisfied is determined by the political decisions of the Mayor, city council, and, because of the unique status of the District of Columbia, the Federal Government as well. As the FTC recognized, see *In re Superior Court Trial Lawyers Assn.*, 107 F. T. C. 510, 572–574 (1986), a *typical* boycott functions by transforming its participants into a single monopolistic entity that restricts supply and increases price. See, *e. g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 459 (1986); *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Oklahoma*, 468 U. S. 85, 109–110 (1984).

The boycott in this case was completely different: it may have persuaded the consumer of the Trial Lawyers' services—the District government—to raise the price it paid by altering the *political* preferences of District officials. Prior to the boycott, these officials perceived that at a time of fiscal austerity, a pay raise for lawyers who represented criminal defendants was not likely to be well received by the voters, whatever the merits of the issue. The SCTLA campaign drew public attention to the lawyers' plight and generated enough sympathy among city residents to convince District officials, many of whom were already favorably inclined toward the Trial Lawyers' cause, that they could augment CJA compensation rates without risking their political futures. Applying the *per se* rule to such a complex situation ignores the possibility that the boycott achieved its goal through a politically driven increase in demand for improved quality of representation, rather than by a cartel-like restriction in supply. The Court of Appeals concluded that "it [was] . . . possible that, lacking any market power, [the Trial Lawyers] procured a rate increase by changing public attitudes through the publicity attending the boycott," 272 U. S. App. D. C., at 297, 856 F. 2d, at 251, or that "the publicity surrounding the boycott may have served . . . to dissipate any public opposition that a substantial raise for lawyers who represent indi-

gent defendants had previously encountered." *Ibid.*[4] The majority is able to reach the contrary conclusion only by disregarding the long history of attempts to raise defense lawyers' compensation levels in the District and the virtually unanimous support the Trial Lawyers enjoyed among members of the bar, the judiciary, and, indeed, officials of the city government.

As the Court appears to recognize, see *ante*, at 421, preboycott rates were unreasonably low. City officials hardly could have reached a different conclusion. After 1970, the CJA set fees at $30 per hour for court time and $20 per hour for out-of-court time, and, despite a 147 percent increase in the Consumer Price Index, compensation remained at those levels until the boycott in 1983. Calculated in terms of 1970 dollars, at the time of the boycott CJA lawyers earned approximately $7.80 per hour for out-of-court time and $11.70 for in-court time. In contrast, in 1983 the typical billing rate for private attorneys in major metropolitan areas with 11 to 20 years of experience was $123 per hour, and the rate for those with less than two years of experience was $64 per hour. See App. in No. 86–1465 (CADC), pp. 678–679, 807. Even attorneys receiving compensation under the Equal Access to Justice Act, 28 U. S. C. § 2412(d)(2)(A)(ii) (1982 ed.), obtained fees of $75 per hour, with the possibility of upward adjustments to still larger sums. The Chairperson of the Judicial Conference Committee to Implement the Criminal Justice Act testified before Congress that "generally, the present Criminal Justice Act compensation rates do not even

[4] The Court quotes the finding of the FTC Administrative Law Judge (ALJ) that there was no evidence that the District government's decision to raise CJA compensation rates responded to the Trial Lawyers' campaign or to public pressure generally. See *ante*, at 416–417. The majority, however, conveniently omits the Court of Appeals' answer to this finding by the ALJ: "[T]he Commission did not reach the question and rejected the ALJ's findings except insofar as it expressly adopted them." 272 U. S. App. D. C., at 297, 856 F. 2d, at 251. By implication, therefore, the Commission rejected the trial examiner's finding on this point.

cover the appointed attorney's office overhead expenses related to time devoted to representation of defendants under the Act." Criminal Justice Act: Hearings on H. R. 3233 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess., 22 (1983) (statement of Hon. Thomas J. MacBride). David B. Isbell, then District of Columbia Bar president, warned that "unrealistic and unreasonable compensation rates have hampered the D. C. CJA program in attracting and retaining significant numbers of qualified criminal defense counsel." *Id.*, at 306.

The legal community became concerned about the low level of CJA fees as early as 1975. The Report on the Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (Austern-Rezneck Report) concluded that the prevailing rates "drove talented attorneys out of CJA practice, and encouraged those who remained to do a less than adequate job on their cases." 272 U. S. App. D. C., at 275, 856 F. 2d, at 229. The Austern-Rezneck Report recommended that CJA lawyers be paid $40 per hour for time spent in or out of court, subject to a ceiling of $800 for a misdemeanor case and $1,000 for a felony case. The Report characterized this increase as "'the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.'" *Ibid.* (quoting Austern-Rezneck Report 84).

In March 1982, the District of Columbia Court System Study Committee of the District of Columbia Bar issued the Horsky Report, which recommended the identical pay increase. See Senate Committee on Governmental Affairs, Senate Print No. 98–34, 98th Cong., 1st Sess. 69 (1983). Legislation increasing the hourly rate to $50 was then introduced in the District of Columbia Council, but the bill died in committee in 1982 without a hearing.

In September 1982, SCTLA officials began a lobbying effort to increase CJA compensation levels. They met with Chief Judge Moultrie of the District of Columbia Superior Court, Herbert Reid, who was counsel to the Mayor, and Wiley Branton, then Dean of Howard University Law School. Chief Judge Moultrie told SCTLA representatives that he thought they deserved more money, but he declined to provide them any public support on the ground that if an increase were implemented, his court might be called upon to decide its legality. See 272 U. S. App. D. C., at 275, 856 F. 2d, at 229. Reid informed them that the Mayor was sympathetic to their cause but would not support legislation without the urging of Chief Judge Moultrie. Dean Branton advised that the SCTLA should do "'something dramatic to attract attention in order to get any relief.'" *Ibid.*

In March 1983, District of Columbia Council Chairman David Clarke introduced a new, less ambitious bill increasing CJA lawyers' pay to $35 per hour. A wide variety of groups testified in favor of the bill at a hearing held by the city council's Judiciary Committee, reflecting an overwhelming consensus on the need to increase CJA rates.[5] No one testified against the bill, though the Executive Office of the District of Columbia Courts worried about how to fund it. The Court of Appeals concluded that "Mayor Barry and other important city officials were sympathetic to the boycotters' goals and may even have been supportive of the boycott itself," *id.*, at 297, n. 35, 856 F. 2d, at 251, n. 35, and that certain statements by the Mayor could be interpreted "as encouraging the [Trial Lawyers] to stage a demonstration of their political

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[5] Groups testifying in favor of the bill included the SCTLA, District of Columbia Bar, D. C. Chapter of the National Lawyers Guild, Public Defender Service, D. C. Chapter of the Washington Psychiatric Society, Family Law Association, National Capitol Area Chapter of the American Civil Liberties Union, and National Center of Institutional Alternatives. See App. in No. 86-1465 (CADC), pp. 800-801.

muscle so that a rate increase could more easily be justified to the public." *Id.*, at 298, n. 35, 856 F. 2d, at 252, n. 35.

Taken together, these facts strongly suggest that the Trial Lawyers' campaign persuaded the city to increase CJA compensation levels by creating a favorable climate in which supportive District officials could vote for a raise without public opposition, even though the lawyers lacked the ability to exert economic pressure. As the court below expressly found, the facts at the very least do not exclude the possibility that the SCTLA succeeded due to political rather than economic power. See *id.*, at 297, 856 F. 2d, at 251. The majority today permits the FTC to find an expressive boycott to violate the antitrust laws, without even requiring a showing that the participants possessed market power or that their conduct triggered any anticompetitive effects. I believe that the First Amendment forecloses such an approach.

II

A

The majority concludes that the Trial Lawyers' boycott may be enjoined without any showing of market power because "the government's interest in adhering to a uniform rule may *sometimes* satisfy the *O'Brien* test even if making an exception to the rule in a particular case might cause no serious damage." *Ante*, at 430 (citing *United States* v. *Albertini*, 472 U. S. 675 (1985)) (emphasis added). The Court draws an analogy between the *per se* rule in antitrust law and categorical proscriptions against airplane stunt flying and reckless automobile driving. See *ante*, at 433–434. This analogy is flawed.

It is beyond peradventure that *sometimes* no exception need be made to a neutral rule of general applicability not aimed at the content of speech; "the arrest of a newscaster for a traffic violation," for example, does not offend the First Amendment. *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697, 708 (1986) (O'CONNOR, J., concurring). Neither do restric-

tions on stunt flying and reckless driving usually raise First Amendment concerns.[6] But ever since *Schneider* v. *State*, 308 U. S. 147 (1939), we have held that even when the government seeks to address harms entirely unconnected with the content of speech, it must leave open ample alternative channels for effective communication. See *Rock Against Racism*, 491 U. S., at 802–803; *Frisby*, 487 U. S., at 483–484; *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 552 (1981) (STEVENS, J., dissenting in part); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648 (1981). Although *sometimes* such content-neutral regulations with incidental effects on speech leave open sufficient room for effective communication, application of the *per se* rule to expressive boycotts does not. The role of boycotts in political speech is too central, and the effective alternative avenues open to the Trial Lawyers were too few, to permit the FTC to invoke the *per se* rule in this case.

Expressive boycotts have been a principal means of political communication since the birth of the Republic. As the Court of Appeals recognized, "boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." 272 U. S. App. D. C., at 294, 856 F. 2d, at 248. From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse. In recent years there have

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[6] Even the criminal law, however, provides procedural safeguards to ensure that laws are not applied in an overbroad fashion to punish activity protected by the First Amendment. The defendant in a criminal trial is always able to raise the defense that the law is unconstitutional as applied to him. See, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397 (1989). Application of the *per se* rule in the instant case denies the Trial Lawyers even this opportunity.

been boycotts of supermarkets, meat, grapes, iced tea in cans, soft drinks, lettuce, chocolate, tuna, plastic wrap, textiles, slacks, animal skins and furs, and products of Mexico, Japan, South Africa, and the Soviet Union. See *Missouri* v. *National Organization for Women, Inc.*, 620 F. 2d 1301, 1304, n. 5 (CA8), cert. denied, 449 U. S. 842 (1980); Note, 80 Colum. L. Rev. 1317, 1318, 1334 (1980). Like soapbox oratory in the streets and parks, political boycotts are a traditional means of "communicating thoughts between citizens" and "discussing public questions." *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). Any restrictions on such boycotts must be scrutinized with special care in light of their historic importance as a mode of expression. Cf. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983).

The Court observes that all boycotts have "an expressive component" in the sense that participants must communicate their plans among themselves and to their target. *Ante*, at 431. The Court reasons that this expressive feature alone does not render boycotts immune from scrutiny under the *per se* rule. Otherwise, the rule could never be applied to any boycotts or to most price-fixing schemes. On this point I concur with the majority. But while some boycotts may not present First Amendment concerns, when a particular boycott appears to operate on a political rather than economic level, I believe that it cannot be condemned under the *per se* rule.[7] The Court disagrees and maintains that communica-

[7] If a boycott uses economic power in an unlawful way to send a message, it cannot claim First Amendment protection from the antitrust laws, any more than a terrorist could use an act of violence to express his political views and then assert immunity from criminal prosecution. Thus, if a cartel in a regulated industry inflicts economic injury on consumers by raising prices in order to communicate with the government, it still would be subject to the *per se* rule. The instant case is different: there is a genuine question whether the SCTLA boycott involved *any* economic coercion at all. That is why a showing of market power is necessary before the boycott can be condemned as an unfair method of competition.

tion of ideas to the public is a function not of a boycott itself but rather of media coverage, interviews, and other activities ancillary to the boycott and not prohibited by the antitrust laws. See *ante*, at 426. The Court also notes that other avenues of speech are open, because "[p]ublicity may be generated by any other activity that is sufficiently newsworthy." *Ante*, at 431. These views are flawed.

First, we have already recognized that an expressive boycott necessarily involves "constitutionally protected activity." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 911 (1982). That case, in which we held that a civil rights boycott was political expression, forecloses the Court's approach today. In *Claiborne Hardware*, JUSTICE STEVENS observed that "[t]he established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'" when combined in an expressive boycott. *Ibid.* (citation omitted). I am surprised that he now finds that the Trial Lawyers' boycott was not protected speech. In this case, as in *Claiborne Hardware*, "[t]hrough the exercise of the[ir] First Amendment rights, petitioners sought to bring about political, social, and economic change." *Ibid.* The Court contends that the SCTLA's motivation differed from that of the boycotters in *Claiborne Hardware*, see *ante*, at 426–427, because the former sought to supplement its members' own salaries rather than to remedy racial injustice. Even if true, the different *purposes* of the speech can hardly render the Trial Lawyers' boycott any less *expressive*.

Next, although the Court is correct that the media coverage of the boycott was substantial,[8] see *ante*, at 414, this

[8] The lawyers actively courted press coverage of their strike. They set up "picket lines," distributed press kits, and granted interviews; the media, both local and national, responded. No fewer than 19 newspaper articles regarding the boycott appeared in the Washington Post, Washington Times, USA Today, and New York Times. The Washington Post's editorial page endorsed the boycott, opining that "[i]t is simply unfair that these fees have remained unchanged during a period when median income in the area has risen over 180 percent." Washington Post, Sept. 8, 1983,

does not support the majority's argument that the boycott itself was not expressive. Indeed, that the SCTLA strove so mightily to communicate with the public and the government is an indication that it relied more on its ability to win public sympathy and persuade government officials politically than on its power to coerce the city economically. But media coverage is not the only, or even the principal, reason why the boycott was entitled to First Amendment protection. The refusal of the Trial Lawyers to accept appointments by itself communicated a powerful idea: CJA compensation rates had deteriorated so much, relatively speaking, that the lawyers were willing to forgo their livelihoods rather than return to work.

By sacrificing income that they actually desired, and thus inflicting hardship on themselves as well as on the city, the lawyers demonstrated the intensity of their feelings and the depth of their commitment. The passive nonviolence of King and Gandhi are proof that the resolute acceptance of pain may communicate dedication and righteousness more eloquently than mere words ever could. A boycott, like a hunger strike, conveys an emotional message that is absent in a letter to the editor, a conversation with the mayor, or even a protest march. Cf. *Cohen* v. *California*, 403 U. S. 15, 26 (1971) (First Amendment protects "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well"). In this respect, an expressive

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p. A20, col. 1. The New York Times reported that "[t]he unusual thing about the lawyer's . . . job action is that almost no one disagrees with their argument." N. Y. Times, Sept. 1, 1983, p. B10, col. 3. United States District Judge Harold H. Greene wrote that the Trial Lawyers "should receive the modest increase they have requested." Washington Post, Sept. 12, 1983, p. A13, col. 2. Even the Economist of London carried a story on the boycott. Sept. 17, 1983, p. 25. Nor was coverage limited to the print media. Local television and radio stations aired numerous reports of the boycott, and an account of the Trial Lawyers' plight appeared on the CBS Morning News. See App. in No. 86–1465 (CADC), pp. 921, 923, 925, 937, 949.

boycott is a special form of political communication. Dean Branton's advice to the Trial Lawyers—that they should do "something dramatic to attract attention"—was sage indeed.

Another reason why expressive boycotts are irreplaceable as a means of communication is that they are essential to the "poorly financed causes of little people." *Martin* v. *Struthers*, 319 U. S. 141, 146 (1943). It is no accident that boycotts have been used by the American colonists to throw off the British yoke and by the oppressed to assert their civil rights. See *Claiborne Hardware*, *supra*. Such groups cannot use established organizational techniques to advance their political interests, and boycotts are often the only effective route available to them.

B

Underlying the majority opinion are apprehensions that the Trial Lawyers' boycott was really no different from any other, and that requiring the FTC to apply a rule-of-reason analysis in this case will lead to the demise of the *per se* rule in the boycott area. I do not share the majority's fears. The boycott before us today is readily distinguishable from those with which the antitrust laws are concerned, on the very ground suggested by the majority: the Trial Lawyers intended to and in fact did "communicate with third parties to enlist public support for their objectives." *Ante*, at 431. As we have seen, in all likelihood the boycott succeeded not due to any market power wielded by the lawyers but rather because they were able to persuade the District government through political means. Other boycotts may involve no expressive features and instead operate solely on an economic level. Very few economically coercive boycotts seek notoriety both because they seek to escape detection and because they have no wider audience beyond the participants and the target.

Furthermore, as the Court of Appeals noted, there may be significant differences between boycotts aimed at the government and those aimed at private parties. See 272 U. S.

App. D. C., at 296, 856 F. 2d, at 250. The government has options open to it that private parties do not; in this suit, for example, the boycott was aimed at a legislative body with the power to terminate it at any time by requiring all members of the District Bar to represent defendants *pro bono*. If a boycott against the government achieves its goal, it likely owes its success to political rather than market power.

The Court's concern for the vitality of the *per se* rule, moreover, is misplaced, in light of the fact that we have been willing to apply rule-of-reason analysis in a growing number of group-boycott cases. See, *e. g.*, *Indiana Federation of Dentists*, 476 U. S., at 458–459; *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S. 284, 293–298 (1985); *National Collegiate Athletic Assn.*, 468 U. S., at 101; *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 9–10 (1979) (criticizing application of *per se* rule because "[l]iteralness is overly simplistic and often overbroad").[9] We have recognized that "there is

[9] Although "group boycotts" often are listed among the types of activity meriting *per se* condemnation, see, *e. g.*, *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 348 (1963); *White Motor Co.* v. *United States*, 372 U. S. 253, 259–260 (1963); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 212 (1959); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958); *Associated Press* v. *United States*, 326 U. S. 1, 12 (1945); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 465–468 (1941), we have recognized that boycotts "'are not a unitary phenomenon.'" *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 543 (1978). In fact, "'there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine.'" *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U. S., at 294 (quoting L. Sullivan, Law of Antitrust 229–230 (1977)). We have observed that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC* v. *Indiana Federation of Dentists*, 476 U. S., at 458. These considerations provide additional reason to analyze the instant case with great care, because the Trial Lawyers' boycott is certainly *sui generis*.

often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *National Collegiate Athletic Assn.*, *supra*, at 104, n. 26.

In short, the conclusion that *per se* analysis is inappropriate in this boycott case would not preclude its application in many others, nor would it create insurmountable difficulties for antitrust enforcement. The plainly expressive nature of the Trial Lawyers' campaign distinguishes it from boycotts that are the intended subjects of the antitrust laws.

I respectfully dissent.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

Like JUSTICE BRENNAN, I, too, join Parts I, II, III, and IV of the Court's opinion. But, while I agree with the reasoning of JUSTICE BRENNAN's dissent, I write separately to express my doubt whether a remand for findings of fact concerning the market power of the Superior Court Trial Lawyers Association (SCTLA or Trial Lawyers) would be warranted in the unique circumstances of this litigation. As JUSTICE BRENNAN notes, the Trial Lawyers' boycott was aimed at the District's courts and legislature, governmental bodies that had the power to terminate the boycott at any time by requiring any or all members of the District Bar—including the members of SCTLA—to represent indigent defendants *pro bono*. Attorneys are not merely participants in a competitive market for legal services; they are officers of the court. Their duty to serve the public by representing indigent defendants is not only a matter of conscience, but is also enforceable by the government's power to order such representation, either as a condition of practicing law in the District or on pain of contempt. See *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required" by court appointment); see also *United States* v. *Accetturo*, 842 F. 2d

1408, 1412–1413 (CA3 1988); *Waters* v. *Kemp*, 845 F. 2d 260, 263 (CA11 1988).*

The Trial Lawyers' boycott thus was a dramatic gesture not fortified by any real economic power. They *could not* have coerced the District to meet their demands by brute economic force, *i. e.*, by constricting the supply of legal services to drive up the price. Instead, the Trial Lawyers' boycott put the government in a position where it had to make a political choice between exercising its power to break the boycott or agreeing to a rate increase. The factors relevant to this choice were political, not economic: that forcing the lawyers to stop the boycott would have been unpopular, because, as it turned out, public opinion supported the boycott; and that the District officials themselves may not have genuinely opposed the rate increase, and may have welcomed the appearance of a politically expedient "emergency."

I believe that, in this unique market where the government buys services that it could readily compel the sellers to provide, the Trial Lawyers lacked any market power and their boycott could have succeeded only through political persuasion. I therefore would affirm the judgment below insofar as it invokes the *United States* v. *O'Brien*, 391 U. S. 367 (1968), analysis to preclude application of the *per se* rule to the Trial Lawyers' boycott, but reverse as to the remand to the FTC for a determination of market power.

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*This Court's recent decision in *Mallard* v. *United States District Court for Southern Dist. of Iowa*, 490 U. S. 296 (1989), is not to the contrary. In that case, the Court held that a particular federal statute, 28 U. S. C. § 1915(d), authorizing the District Court to "request" that an attorney represent an indigent litigant, does not give the court power to require an unwilling attorney to serve. The Court expressed no opinion on "whether the federal courts possess inherent authority to require lawyers to serve." 490 U. S., at 310. Indeed, by way of background, the Court discussed numerous state and federal statutes that *do* empower the courts to compel attorneys to serve. *Id.*, at 302–308.

Syllabus

TAFFLIN ET AL. *v.* LEVITT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–1650. Argued November 27, 1989—Decided January 22, 1990

Petitioners, nonresidents of Maryland who are holders of unpaid certificates of deposit issued by a failed Maryland savings and loan association, filed a civil action in the Federal District Court against respondents, former association officers and directors and others, alleging claims under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968. The court dismissed the action, concluding, among other things, that federal abstention was appropriate as to the civil RICO claims, which had been raised in pending litigation in state court, since state courts have concurrent jurisdiction over such claims. The Court of Appeals affirmed.

Held: State courts have concurrent jurisdiction over civil RICO claims. The presumption in favor of such jurisdiction has not been rebutted by any of the factors identified in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478. Pp. 458–467.

(a) As petitioners concede, there is nothing in RICO's explicit language to suggest that Congress has, by affirmative enactment, divested state courts of civil RICO jurisdiction. To the contrary, § 1964(c)'s grant of federal jurisdiction over civil RICO claims is plainly permissive and thus does not operate to oust state courts from concurrent jurisdiction. Pp. 460–461.

(b) RICO's legislative history reveals no evidence that Congress even considered the question of concurrent jurisdiction, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over civil RICO claims on the federal courts. Petitioners' argument that, because Congress modeled § 1964(c) after § 4 of the Clayton Act—which confers exclusive jurisdiction on the federal courts—it intended, by implication, to grant exclusive federal jurisdiction over § 1964(c) claims is rejected. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, and *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U. S. 143, are distinguished, since those cases looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type presented here. Pp. 461–463.

(c) No "clear incompatibility" exists between state court jurisdiction and federal interests. The interest in uniform interpretation of federal criminal laws, see 18 U. S. C. § 3231, is not inconsistent with such juris-

diction merely because state courts would be required to construe the federal crimes that constitute RICO predicate acts. Section 1964(c) claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions. There is also no significant danger of inconsistent application of federal criminal law, since federal courts would not be bound by state court interpretations of predicate acts, since state courts would be guided by federal court interpretations of federal criminal law, and since any state court judgments misinterpreting federal criminal law would be subject to direct review by this Court. Moreover, state courts have the ability to handle the complexities of civil RICO actions. Many cases involve asserted violations of state law, over which state courts presumably have greater expertise, and it would seem anomalous to rule that they are incompetent to adjudicate civil RICO claims when such claims are subject to adjudication by arbitration, see *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 239. Further, although the fact that RICO's procedural mechanisms are applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests. And, to the extent that Congress intended RICO to serve broad remedial purposes, concurrent jurisdiction will advance rather than jeopardize federal policies underlying the statute. Pp. 464–467.

865 F. 2d 595, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 467. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 469.

M. Norman Goldberger argued the cause for petitioners. With him on the briefs were *Brian P. Flaherty*, *Gary L. Leshko*, and *Lawrence I. Weisman*.

Andrew H. Marks argued the cause for respondents. With him on the brief were *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Ralph S. Tyler III*, Assistant Attorney General, *Clifton S. Elgarten*, *Luther Zeigler*, *David B. Isbell*, *William H. Allen*, *Charles F. C. Ruff*, and *Mark H. Lynch*.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether state courts have concurrent jurisdiction over civil actions brought under the

Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968.

I

The underlying litigation arises from the failure of Old Court Savings & Loan, Inc. (Old Court), a Maryland savings and loan association, and the attendant collapse of the Maryland Savings-Share Insurance Corp. (MSSIC), a state-chartered nonprofit corporation created to insure accounts in Maryland savings and loan associations that were not federally insured. See *Brandenburg* v. *Seidel*, 859 F. 2d 1179, 1181–1183 (CA4 1988) (reviewing history of Maryland's savings and loan crisis). Petitioners are nonresidents of Maryland who hold unpaid certificates of deposit issued by Old Court. Respondents are the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Old Court and MSSIC, the accounting firm of Old Court, and the State of Maryland Deposit Insurance Fund Corp., the state-created successor to MSSIC. Petitioners allege various state law causes of action as well as claims under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, 15 U. S. C. § 78a *et seq.*, and RICO.

The District Court granted respondents' motions to dismiss, concluding that petitioners had failed to state a claim under the Exchange Act and that, because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The Court of Appeals for the Fourth Circuit affirmed. 865 F. 2d 595 (1989). The Court of Appeals agreed with the District Court that the Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act, see 15 U. S. C. § 78c(a)(10), and that petitioners' Exchange Act claims were therefore properly dismissed. 865 F. 2d, at 598–599. The Court of Appeals further held, in reliance on its prior decision in *Brandenburg* v. *Seidel*,

supra, that "a RICO action could be instituted in a state court and that Maryland's 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations,' 859 F. 2d at 1191, provided a proper basis for the district court to abstain under the authority of *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943)." 865 F. 2d, at 600 (citations omitted).

To resolve a conflict among the federal appellate courts and state supreme courts,[1] we granted certiorari limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. 490 U. S. 1089 (1989). We hold that they do and accordingly affirm the judgment of the Court of Appeals.

II

We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, *e. g.*, *Houston* v. *Moore*, 5 Wheat. 1, 25–26

[1] Compare *McCarter* v. *Mitcham*, 883 F. 2d 196, 201 (CA3 1989) (concurrent jurisdiction); *Brandenburg* v. *Seidel*, 859 F. 2d 1179, 1193–1195 (CA4 1988) (same); *Lou* v. *Belzberg*, 834 F. 2d 730, 738–739 (CA9 1987) (same), cert. denied, 485 U. S. 993 (1988); *Simpson Elec. Corp.* v. *Leucadia, Inc.*, 72 N. Y. 2d 450, 530 N. E. 2d 860 (1988) (same); *Rice* v. *Janovich*, 109 Wash. 2d 48, 742 P. 2d 1230 (1987) (same); *Cianci* v. *Superior Court*, 40 Cal. 3d 903, 710 P. 2d 375 (1985) (same); *County of Cook* v. *MidCon Corp.*, 773 F. 2d 892, 905, n. 4 (CA7 1985) (dictum); *Dubroff* v. *Dubroff*, 833 F. 2d 557, 562 (CA5 1987) (civil RICO claims can "probably" be brought in state court), with *Chivas Products Ltd.* v. *Owen*, 864 F. 2d 1280, 1286 (CA6 1988) (exclusive jurisdiction); *VanderWeyst* v. *First State Bank of Benson*, 425 N. W. 2d 803, 812 (Minn.) (expressing "serious reservations" about assuming concurrent RICO jurisdiction), cert. denied, 488 U. S. 943 (1988). See generally Note, 57 Ford. L. Rev. 271, 271, n. 9 (1988) (listing federal and state courts in conflict); Note, 73 Cornell L. Rev. 1047, 1047, n. 5 (1988) (same); Note, 62 St. John's L. Rev. 301, 303, n. 7 (1988) (same).

(1820); *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876); *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511, 517 (1898); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 507–508 (1962); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 477–478 (1981). As we noted in *Claflin*, "if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." 93 U. S., at 136; see also *Dowd Box*, *supra*, at 507–508 ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule"). See generally 1 J. Kent, Commentaries on American Law *400; The Federalist No. 82 (A. Hamilton); F. Frankfurter & J. Landis, The Business of the Supreme Court 5–12 (1927); H. Friendly, Federal Jurisdiction: A General View 8–11 (1973).

This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, *e. g.*, *Claflin*, *supra*, at 137 ("Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction") (citations omitted); see also *Houston*, *supra*, at 25–26. As we stated in *Gulf Offshore:*

> "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear in-

> compatibility between state-court jurisdiction and federal interests." 453 U. S., at 478 (citations omitted).

See also *Claflin*, *supra*, at 136 (state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"). The parties agree that these principles, which have "remained unmodified through the years," *Dowd Box*, *supra*, at 508, provide the analytical framework for resolving this case.

III

The precise question presented, therefore, is whether state courts have been divested of jurisdiction to hear civil RICO claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore*, *supra*, at 478. Because we find none of these factors present with respect to civil claims arising under RICO, we hold that state courts retain their presumptive authority to adjudicate such claims.

At the outset, petitioners concede that there is nothing in the language of RICO—much less an "explicit statutory directive"—to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims. The statutory provision authorizing civil RICO claims provides in full:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may* sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U. S. C. § 1964(c) (emphasis added).

This grant of federal jurisdiction is plainly permissive, not mandatory, for "[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal dis-

trict courts, not that they must be." *Dowd Box*, *supra*, at 506. Indeed, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore*, *supra*, at 479 (citing *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479 (1936)).

Petitioners thus rely solely on the second and third factors suggested in *Gulf Offshore*, arguing that exclusive federal jurisdiction over civil RICO actions is established "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," 453 U. S., at 478.

Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, "[t]he legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman of RICO has remarked, 'no one even thought of the issue.'" *Brandenburg*, 859 F. 2d, at 1193 (quoting Flaherty, Two States Lay Claim to RICO, Nat. L. J., May 7, 1984, p. 10, col. 2); see also *Lou* v. *Belzberg*, 834 F. 2d 730, 736 (CA9 1987) ("The legislative history provides 'no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action'") (citation omitted), cert. denied, 485 U. S. 993 (1988); *Chivas Products Ltd.* v. *Owen*, 864 F. 2d 1280, 1283 (CA6 1988) ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil

RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even *consider* the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

Sensing this void in the legislative history, petitioners rely, in the alternative, on our decisions in *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), and *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U. S. 143 (1987), in which we noted that Congress modeled § 1964(c) after § 4 of the Clayton Act, 15 U. S. C. § 15(a). See *Sedima*, *supra*, at 489; *Agency Holding*, *supra*, at 151–152. Petitioners assert that, because we have interpreted § 4 of the Clayton Act to confer exclusive jurisdiction on the federal courts, see, *e. g.*, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 286–288 (1922), and because Congress may be presumed to have been aware of and incorporated those interpretations when it used similar language in RICO, cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 694–699 (1979), Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under § 1964(c).

This argument is also flawed. To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. In the instant case, the lack of any indication in RICO's legislative history that Congress either considered or assumed that the importing of remedial language from the Clayton Act into RICO had any jurisdictional implications is dispositive. The "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Lou*, *supra*, at 737. Indeed, to the

extent we impute to Congress knowledge of our Clayton Act precedents, it makes no less sense to impute to Congress knowledge of *Claflin* and *Dowd Box*, under which Congress, had it sought to confer exclusive jurisdiction over civil RICO claims, would have had every incentive to do so expressly.

Sedima and *Agency Holding* are not to the contrary. Although we observed in *Sedima* that "[t]he clearest current in [the legislative] history [of § 1964(c)] is the reliance on the Clayton Act model," 473 U. S., at 489, that statement was made in the context of noting the distinction between "private and governmental actions" under the Clayton Act. *Ibid.* We intimated nothing as to whether Congress' reliance on the Clayton Act implied any intention to establish exclusive federal jurisdiction for civil RICO claims, and in *Sedima* itself we *rejected* any requirement of proving "racketeering injury," noting that to borrow the "antitrust injury" requirement from antitrust law would "creat[e] exactly the problems Congress sought to avoid." *Id.*, at 498–499. Likewise, in *Agency Holding* we were concerned with "borrowing," in light of legislative silence on the issue, an appropriate statute of limitations period from an "analogous" statute. 483 U. S., at 146. Under such circumstances, we found it appropriate to borrow the statute of limitations from the Clayton Act. *Id.*, at 152. In this case, by contrast, where the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action. Under *Gulf Offshore*, legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction. In short, in both *Sedima* and *Agency Holding* we looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type present in this case. Thus, to whatever extent the Clayton Act analogy may be relevant to our interpretation of RICO generally, it has no place in our inquiry into the jurisdiction of state courts.

Petitioners finally urge that state court jurisdiction over civil RICO claims would be clearly incompatible with federal interests. We noted in *Gulf Offshore* that factors indicating clear incompatibility "include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." 453 U. S., at 483–484 (citation and footnote omitted). Petitioners' primary contention is that concurrent jurisdiction is clearly incompatible with the federal interest in uniform interpretation of federal criminal laws, see 18 U. S. C. § 3231,[2] because state courts would be required to construe the federal crimes that constitute predicate acts defined as "racketeering activity," see 18 U. S. C. §§ 1961(1)(B), (C), and (D). Petitioners predict that if state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and that the federal courts will consequently lose control over the orderly and uniform development of federal criminal law.

We perceive no "clear incompatibility" between state court jurisdiction over civil RICO actions and federal interests. As a preliminary matter, concurrent jurisdiction over § 1964(c) suits is clearly not incompatible with § 3231 itself, for civil RICO claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions—uniform or otherwise. See *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 240–241 (1987) (civil RICO intended to be primarily remedial rather than punitive).

More to the point, however, our decision today creates no significant danger of inconsistent application of federal crimi-

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[2] Title 18 U. S. C. § 3231 provides in full:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

nal law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well taken, see *Ableman* v. *Booth*, 21 How. 506, 517–518 (1859); cf. *Musser* v. *Utah*, 333 U. S. 95, 97 (1948) (vague criminal statutes may violate the Due Process Clause), federal courts, pursuant to § 3231, would retain full authority and responsibility for the interpretation and application of federal criminal law, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law, see, *e. g.*, *Commissioner* v. *Estate of Bosch*, 387 U. S. 456, 465 (1967). State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, cf. *Pan-American Petroleum Corp.* v. *Superior Court of Delaware, Newcastle County*, 366 U. S. 656, 665–666 (1961) (rejecting claim that uniform interpretation of the Natural Gas Act will be jeopardized by concurrent jurisdiction), and will not, in any event, result in any more inconsistency than that which a multimembered, multitiered federal judicial system already creates, cf. *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 235, n. 2 (1989) (surveying conflict among federal appellate courts over RICO's "pattern of racketeering activity" requirement).

Moreover, contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. See 18 U. S. C. § 1961(1)(A) (listing state law offenses constituting predicate acts); *Gulf Offshore*, *supra*, at 484

("State judges have greater expertise in applying" laws "whose governing rules are borrowed from state law"); see also *Sedima*, 473 U. S., at 499 (RICO "has become a tool for everyday fraud cases"); BNA, Civil RICO Report, Vol. 2, No. 44, p. 7 (Apr. 14, 1987) (54.9% of all RICO cases after *Sedima* involved "common law fraud" and another 18% involved either "nonsecurities fraud" or "theft or conversion"). To hold otherwise would not only denigrate the respect accorded coequal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction," *Dowd Box*, 368 U. S., at 508. Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found no inconsistency in subjecting civil RICO claims to adjudication by arbitration. See *Shearson/American Express*, *supra*, at 239 (rejecting argument that "RICO claims are too complex to be subject to arbitration" and that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

Petitioners further note, as evidence of incompatibility, that RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court, see 18 U. S. C. § 1965. We think it sufficient, however, to observe that we have previously found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms similar to those found in RICO. See, *e. g.*, *Dowd Box*, *supra* (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions); *Maine* v. *Thiboutot*, 448 U. S. 1, 3, n. 1 (1980) (finding concurrent jurisdiction over 42 U. S. C. § 1983 suits, despite federal procedural provisions in § 1988); cf. *Hathorn* v. *Lovorn*, 457 U. S. 255, 269 (1982) (finding concurrent jurisdiction over disputes regarding the applicability of § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, despite provision for a three-judge panel). Although congressional specification

of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests.

Finally, we note that, far from disabling or frustrating federal interests, "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." *Gulf Offshore*, 453 U. S., at 478, n. 4; see also *Dowd Box*, *supra*, at 514 (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, *e. g.*, Pub. L. 91–452, § 904(a), 84 Stat. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); *Sedima*, *supra*, at 492, n. 10 ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute.

For all of the above reasons, we hold that state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise. The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE WHITE, concurring.

I agree that state courts have concurrent jurisdiction over civil RICO actions and join the opinion and judgment of the Court. I add a few words only because this Court has rarely considered contentions that civil actions based on federal criminal statutes must be heard by the federal courts. As the Court observes, *ante*, at 465, the uniform construction of federal criminal statutes is no insignificant matter, particularly because Congress has recognized potential dangers in nonuniform construction and has confined jurisdiction over

federal criminal cases to the federal courts. There is, therefore, reason for caution before concluding that state courts have jurisdiction over civil claims related to federal criminal statutes and for assessing in each case the danger to federal interests presented by potential inconsistent constructions of federal criminal statutes.

RICO is an unusual federal criminal statute. It borrows heavily from state law; racketeering activity is defined in terms of numerous offenses chargeable under state law, 18 U. S. C. § 1961(1)(A), as well as various federal offenses. To the extent that there is any danger under RICO of nonuniform construction of criminal statutes, it is quite likely that the damage will result from federal misunderstanding of the content of state law—a problem, to be sure, but not one to be solved by exclusive federal jurisdiction. Many of the federal offenses named as racketeering activity under RICO have close, though perhaps not exact, state-law analogues, cf. *Durland* v. *United States*, 161 U. S. 306, 312 (1896), which construed the federal mail fraud statute, and it is unlikely that the state courts will be incompetent to construe those federal statutes. Nor does incorrect state-court construction of those statutes present as significant a threat to federal interests as that posed by improper interpretation of the federal antitrust laws, which could have a disastrous effect on interstate commerce, a particular concern of the Federal Government. Racketeering activity as defined by RICO includes other federal offenses without state-law analogues, but given the history as written until now of civil RICO litigation, I doubt that state-court construction of these offenses will be greatly disruptive of important federal interests.

There is also the possibility that the state courts will disrupt the uniform construction of criminal RICO by launching new interpretations of the "pattern" and "enterprise" elements of that offense when hearing civil RICO suits. This possibility, though not insubstantial, cf. *H. J. Inc.* v. *North-*

western Bell Telephone Co., 492 U. S. 229 (1989), is not enough to require exclusive federal jurisdiction of civil RICO claims. Even though varying interpretations of the "pattern" and "enterprise" elements of RICO may drastically change the consequences that flow from particular acts, these variations cannot make an act criminal in one court system but blameless in another and therefore do not implicate the core due process concerns identified by the Court, *ante*, at 464, as underlying the need for uniform construction of criminal statutes. Moreover, we have the authority to reduce the risk of, and to set aside, incorrect interpretations of these elements of RICO liability.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court, addressing the issues before us on the basis argued by the parties, which has included acceptance of the dictum in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 478 (1981), that "'the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'" *Ante*, at 459–460. Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules. I write separately, before this one has become too entrenched, to note my view that in one respect it is not a correct statement of the law, and in another respect it may not be.

State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, see, *e. g.*, *McKenna* v. *Fisk*, 1 How. 241, 247–249 (1843); but because "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two

together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . ." *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876); see also *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 221–223 (1916).

It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction—an exercise of what one of our earliest cases referred to as "the power of congress *to withdraw*" federal claims from state-court jurisdiction. *Houston* v. *Moore*, 5 Wheat. 1, 26 (1820) (emphasis added). See also *Bombolis*, *supra*, at 221 (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"); *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction").

As an original proposition, it would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, cf. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 243 (1985) (state sovereign immunity can be eliminated only by "clear statement"), at least *expressly*. That was the view of Alexander Hamilton:

> "When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, p. 132 (E. Bourne ed. 1947).

See also *Galveston, H. & S. A. R. Co.* v. *Wallace*, 223 U. S. 481, 490 (1912) ("[J]urisdiction is not defeated by implication"). Although as early as *Claflin*, see 93 U. S., at 137,

and as late as *Gulf Offshore*, we have *said* that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act—where the full extent of our analysis was the less than compelling statement that provisions giving the right to sue in United States District Court "show that [the right] is to be exercised *only* in a 'court of the United States.'" *General Investment Co.* v. *Lake Shore & Michigan Southern R. Co.*, 260 U. S. 261, 287 (1922) (emphasis added). See also *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, 440 (1920) (dictum); *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 451, n. 6 (1943) (dictum); *Hathorn* v. *Lovorn*, 457 U. S. 255, 267, n. 18 (1982) (dictum). In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought "only" in federal court, Investment Company Act of 1940, as amended, 84 Stat. 1429, 15 U. S. C. § 80a–35(b)(5); that the jurisdiction of the federal courts shall be "exclusive," Securities Exchange Act of 1934, as amended, 48 Stat. 902, 15 U. S. C. § 78aa; Natural Gas Act of 1938, 52 Stat. 833, 15 U. S. C. § 717u; Employee Retirement Income Security Act of 1974, 88 Stat. 892, 29 U. S. C. § 1132(e)(1); or indeed even that the jurisdiction of the federal courts shall be "exclusive of the courts of the States," 18 U. S. C. § 3231 (criminal cases); 28 U. S. C. §§ 1333 (admiralty, maritime, and prize cases), 1334 (bankruptcy cases), 1338 (patent, plant variety protection, and copyright cases), 1351 (actions against consuls or vice consuls of foreign states), 1355 (actions for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), 1356 (seizures on land or water not within admiralty and maritime jurisdiction).

Assuming, however, that exclusion by implication is possible, surely what is required is implication in the text of the statute, and not merely, as the second part of the *Gulf Offshore* dictum would permit, through "unmistakable implica-

tion from legislative history." 453 U. S., at 478. Although *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962), after concluding that the statute "does not state nor even suggest that [federal] jurisdiction shall be exclusive," *id.*, at 506, proceeded quite unnecessarily to examine the legislative history, it did so to reinforce rather than contradict the conclusion it had already reached. We have never found state jurisdiction excluded by "unmistakable implication" from legislative history. It is perhaps harmless enough to say that it can be, since one can hardly imagine an "implication from legislative history" that is "unmistakable"—*i. e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the proposition is embodied in statutory text to which those parties have given assent. But harmless or not, it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it with unmistakable clarity. What is needed to oust the States of jurisdiction is congressional *action* (*i. e.*, a provision of law), not merely congressional discussion.

It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of the *Gulf Offshore* dictum, "clear incompatibility between state-court jurisdiction and federal interests." 453 U. S., at 478. If the phrase is interpreted more broadly than that, however—if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic federal interests make it undesirable—it has absolutely no foundation in our precedent.

Gulf Offshore cited three cases to support its "incompatibility" formulation. The first was *Dowd Box*, *supra*, at 507–508, which contains nothing to support any "incompatibility" principle, except a quotation from the second case *Gulf Off-*

shore cited, *Claflin*. Indeed, in response to the argument that "[o]nly the federal judiciary . . . possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary" to elaborate a coherent system of national labor laws, the *Dowd Box* opinion said: "Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting § 301." 368 U. S., at 507. The second case cited was *Claflin*, which said that concurrent jurisdiction exists "where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." 93 U. S., at 136. The subsequent discussion makes it entirely clear, however, that what the Court meant by "incompatibility in its exercise arising from the nature of the particular case" was that the particular statute at issue impliedly excluded state-court jurisdiction. "Congress," the Court said, "may, if it sees fit, give to the Federal courts exclusive jurisdiction," which it does "sometimes . . . by express enactment and sometimes by implication." *Id.*, at 137. The third case cited, *Garner* v. *Teamsters*, 346 U. S. 485 (1953), had nothing to do with state-court jurisdiction over a federal cause of action. It held that the National Labor Relations Act, whose express provision that the jurisdiction of the National Labor Relations Board shall be exclusive had already been held to prevent *federal* courts from assuming primary jurisdiction over labor disputes, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 48 (1938), prevented *state* courts as well.

In sum: As the Court holds, the RICO cause of action meets none of the three tests for exclusion of state-court jurisdiction recited in *Gulf Offshore*. Since that is so, the proposition that meeting any one of the tests would have sufficed is dictum here, as it was there. In my view meeting the second test is assuredly not enough, and meeting the third may not be.

HOLLAND *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 88–5050. Argued October 11, 1989—Decided January 22, 1990

During jury selection at his state-court trial on various felony charges, petitioner, who is white, objected to the State's peremptory challenges that struck the two black venire members from the petit jury, on the ground that he had a Sixth Amendment right to "be tried by a representative cross section of the community." The trial judge overruled the objection, and petitioner was convicted of all but one of the charges. On appeal, the Illinois Supreme Court upheld the convictions and rejected petitioner's Sixth Amendment challenge to the exclusion of black jurors.

Held:

1. Petitioner has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury. Although a defendant, in order to establish a prima facie Equal Protection Clause violation, "must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race," *Batson* v. *Kentucky*, 476 U. S. 79, 96, this Court has never suggested that such correlation between the group identification of the defendant and the group identification of the excluded venire member is necessary for Sixth Amendment standing. To the contrary, the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community. That petitioner seeks an extension of the fair-cross-section requirement from the venire to the petit jury does not affect his standing to assert it. Pp. 476–477.

2. Petitioner's Sixth Amendment claim is without merit because a prohibition upon the exclusion of cognizable groups through peremptory challenges has no basis in the Amendment's text, is without support in this Court's decisions, and would undermine rather than further the Amendment's guarantee of the right to trial by "an impartial jury." The Amendment's requirement that the venire from which the jury is chosen represent a fair cross section of the community constitutes a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does). Without such a requirement, the State would have, in effect, unlimited peremptory challenges to compose the pool from which the jury is drawn in its favor. This Court's decisions make clear that in no way can the fair-cross-section requirement be interpreted to prohibit peremptory challenges. See, *e. g.*,

Lockhart v. *McCree*, 476 U. S. 162, 173. Such challenges have been considered "a necessary part of trial by jury," *Swain* v. *Alabama*, 380 U. S. 202, 219, and serve the Sixth Amendment's goal of impartiality by permitting both the defendant and the State to eliminate prospective jurors belonging to groups they believe would unduly favor the other side, thereby removing extremes of partiality on both sides. Thus, the constitutional goal of "an impartial jury" would positively be obstructed by a petit jury fair-cross-section requirement, which would cripple the peremptory challenge device. The rule of *Batson*, *supra*, cannot be incorporated into the Sixth Amendment. Although that case extended the Equal Protection Clause's prohibition of race-based exclusion from the venire stage to the individual petit jury stage, it did so not because the two stages are inseparably linked, but because the Fourteenth Amendment's intransigent prohibition of racial discrimination applies to both. This case does not present an equal protection issue, and race as such has nothing to do with the question before the Court. Petitioner is not a black man and his Sixth Amendment claim would be just as strong if the object of the State's exclusion of jurors had been, not blacks, but any other identifiable group. Pp. 477–488.

121 Ill. 2d 136, 520 N. E. 2d 270, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, at p. 488. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, at p. 490. STEVENS, J., filed a dissenting opinion, *post*, at p. 504.

Donald S. Honchell argued the cause for petitioner. With him on the briefs were *Randolph N. Stone*, *Alison Edwards*, and *Ronald P. Alwin*.

Inge Fryklund argued the cause for respondent. With her on the brief were *Neil F. Hartigan*, Attorney General of Illinois, *Robert J. Ruiz*, Solicitor General, *Terence M. Madsen*, Assistant Attorney General, and *Cecil A. Partee*.*

JUSTICE SCALIA delivered the opinion of the Court.

The questions presented by this case are (1) whether a white defendant has standing to raise a Sixth Amendment

**Steven R. Shapiro*, *Julius LeVonne Chambers*, and *Charles Stephen Ralston* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

challenge to the prosecutor's exercise of peremptory challenges to exclude all black potential jurors from his petit jury, and (2) whether such exclusion violates his Sixth Amendment right to trial by an impartial jury.

I

Petitioner Daniel Holland was charged in the Circuit Court of Cook County, Illinois, with aggravated kidnaping, rape, deviate sexual assault, armed robbery, and aggravated battery. According to his allegations, a venire of 30 potential jurors was assembled, 2 of whom were black. Petitioner's counsel objected to those of the State's peremptory challenges that struck the two black venire members from the petit jury, on the ground that petitioner had a Sixth Amendment right to "be tried by a representative cross section of the community." App. 7–8. The trial judge overruled the objection, and petitioner was subsequently convicted of all except the aggravated battery charge. The convictions were reversed by the Illinois Appellate Court, First District, 147 Ill. App. 3d 323, 497 N. E. 2d 1230 (1986), on grounds that are irrelevant here, but on further appeal by the State were reinstated by the Illinois Supreme Court, which rejected petitioner's Equal Protection Clause and Sixth Amendment challenges to the exclusion of the black jurors. 121 Ill. 2d 136, 520 N. E. 2d 270 (1987). We granted Holland's petition for certiorari asserting that the Sixth Amendment holding was error. 489 U. S. 1051 (1989).

II

The threshold question is whether petitioner, who is white, has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury. We hold that he does.

In *Batson* v. *Kentucky*, 476 U. S. 79, 96 (1986), we said that to establish a prima facie Equal Protection Clause violation in the discriminatory exclusion of petit jurors, the defendant "must show that he is a member of a cognizable racial

group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire *members of the defendant's race.*" (Emphasis added.) We have never suggested, however, that such a requirement of correlation between the group identification of the defendant and the group identification of excluded venire members is necessary for Sixth Amendment standing. To the contrary, our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs. See, *e. g.*, *Duren* v. *Missouri*, 439 U. S. 357 (1979); *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). Thus, in *Taylor*, we found standing in circumstances analogous to petitioner's:

> "The State first insists that Taylor, a male, has no standing to object to the exclusion of women from his jury. But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service." *Id.*, at 526.

Of course, in this case petitioner seeks an extension of the fair-cross-section requirement from the venire to the petit jury—but that variation calls into question the scope of the Sixth Amendment guarantee, not his standing to assert it. We proceed, then, to the merits of the claim.

III

Petitioner asserts that the prosecutor intentionally used his peremptory challenges to strike all black prospective jurors solely on the basis of their race, thereby preventing a distinctive group in the community from being represented

on his jury. This, he contends, violated the Sixth Amendment by denying him a "fair possibility" of a petit jury representing a cross section of the community. Petitioner invites us to remedy the perceived violation by incorporating into the Sixth Amendment the test we devised in *Batson* to permit black defendants to establish a prima facie violation of the Equal Protection Clause. Under petitioner's approach, a defendant of any race could establish a prima facie violation of the Sixth Amendment by objecting to the use of peremptory challenges to exclude all blacks from the jury. The burden would then shift to the prosecutor to show that the exercise of his peremptory challenges was not based on intentional discrimination against the black potential jurors solely because of their race. Only if the prosecutor could then show nonracial grounds for the strikes would no Sixth Amendment violation be found.

We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury. While statements in our prior cases have alluded to such a "fair possibility" requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire, see *Lockhart* v. *McCree*, 476 U. S. 162 (1986); *Duren*, *supra*; *Taylor*, *supra*, and the use of a jury numbering at least six persons, see *Ballew* v. *Georgia*, 435 U. S. 223 (1978); *Williams* v. *Florida*, 399 U. S. 78 (1970). A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury.

It has long been established that racial groups cannot be excluded from the venire from which a jury is selected. That constitutional principle was first set forth not under the Sixth Amendment but under the Equal Protection Clause.

Strauder v. *West Virginia*, 100 U. S. 303 (1880). In that context, the object of the principle and the reach of its logic are not established by our common-law traditions of jury trial, but by the Fourteenth Amendment's prohibition of unequal treatment in general and racial discrimination in particular. That prohibition therefore has equal application at the petit jury and the venire stages, as our cases have long recognized. Thus, in a decision rendered only 12 years after the Fourteenth Amendment was enacted, striking down a West Virginia law that excluded blacks from jury service, we said:

> "[I]t is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Strauder*, *supra*, at 309.

Four Terms ago, in *Batson*, we squarely held that race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage—not because the two stages are inseparably linked, but because the intransigent prohibition of racial discrimination contained in the Fourteenth Amendment applies to both of them.

Our relatively recent cases, beginning with *Taylor* v. *Louisiana*, hold that a fair-cross-section venire requirement is imposed by the Sixth Amendment, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The fair-cross-section venire requirement is obviously not explicit in this text, but is derived from the traditional understanding of how an "impartial jury" is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, "drawn *from* a fair cross section of the community," *Taylor*, 419 U. S., at 527 (emphasis added). But it has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory-challenge system operates. As we described that system in *Swain* v. *Alabama*, 380 U. S. 202 (1965):

> "[The peremptory challenge] is often exercised . . . on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." *Id.*, at 220–221 (citation and footnote omitted).

The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does). Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield

petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.

But to say that the Sixth Amendment deprives the State of the ability to "stack the deck" in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side. Any theory of the Sixth Amendment leading to that result is implausible. The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, see 4 W. Blackstone, Commentaries 346–348 (1769), was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, see Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119, was recognized in an opinion by Justice Story to be part of the common law of the United States, see *United States* v. *Marchant*, 12 Wheat. 480, 483–484 (1827), and has endured through two centuries in all the States, see *Swain*, *supra*, at 215–217. The constitutional phrase "impartial jury" must surely take its content from this unbroken tradition.[1] One could plausibly

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[1] JUSTICE STEVENS asserts that our "historical claims are significantly overstated," and that we "will have to do better than Blackstone and the 1790 Congress" for support. *Post*, at 518, n. 15. As to the former, he quotes "[w]hat Blackstone actually said"—namely, that the King had no peremptory challenges but only challenges for cause. *Ibid.* But JUSTICE STEVENS' quotation should have continued to the next two sentences of what Blackstone actually said: "However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn." 4 W. Blackstone, Commentaries 347 (1769).

The 1790 legislation provided that if, in a treason or capital prosecution, the defendant should refuse to plead, or should repeatedly exercise pe-

argue (though we have said the contrary, see *Stilson* v. *United States*, 250 U. S. 583, 586 (1919)) that the requirement of an "impartial jury" impliedly *compels* peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them. We have gone out of our way to make this clear in our opinions. In *Lockhart*, we said: "We have never invoked the fair-cross-section principle to invali-

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remptory challenges past a certain number (35 for treason, 20 for other capital cases), "the court . . . shall notwithstanding proceed to . . . trial . . . as if [the defendant] had pleaded not guilty." 1 Stat. 119. The statute's relevance to the present inquiry is that it constitutes acknowledgment of the common-law practice of peremptory challenge, a practice that unquestionably extended to defense and prosecution alike. The Supreme Court decision cited in text, *United States* v. *Marchant*, 12 Wheat. 480 (1827), specifically interpreted the Act to permit "[t]he acknowledged right of peremptory challenge existing *in the crown* before the statute of 33 Edw. I., and the uniform practice which has prevailed since that statute," *id.*, at 484 (emphasis added). JUSTICE STEVENS relies upon a later case, *United States* v. *Shackleford*, 18 How. 588, 590 (1856), which said that the 1790 Act does not demand that prosecutorial peremptory challenges remain available in all federal courts despite the Act of July 20, 1840, 5 Stat. 394, which required peremptory challenges to conform with state law. This entirely misses our point—which is not that the 1790 Act made the prosecutor's peremptory challenge a part of federal statutory law, but merely that (as *Marchant* held) it acknowledged the prosecutor's peremptory challenge to be part of the well-established common law that formed the background of the Sixth Amendment. Far from refuting this, *Shackleford* reinforces it, referring to the "qualified right [of peremptory challenge], existing at common law, by the government." 18 How., at 590.

JUSTICE STEVENS contends that the historical record is in any event of not much importance to the question before us, since "[t]he Court has forsworn reliance on venerable history to give meaning to the Sixth Amendment's numerosity and unanimity requirements," and so should not rely upon it here either. *Post*, at 518. We have certainly held that a *departure* from historical practice regarding number and unanimity of jurors does not necessarily deny the right of jury trial. But that is quite different from saying that *adherence* to historical practice can deny the right of jury trial. Under a historically unencumbered Sixth Amendment of the sort JUSTICE STEVENS apparently envisions, it would be conceivable that a 12-person or a unanimous jury is unconstitutional.

date the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U. S., at 173. In *Taylor*, we "emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." 419 U. S., at 538. Accord, *Duren* v. *Missouri*, 439 U. S., at 363–364, and n. 20.

The fundamental principle underlying today's decision is the same principle that underlay *Lockhart*, which rejected the claim that allowing challenge for cause, in the guilt phase of a capital trial, to jurors unalterably opposed to the death penalty (so-called "*Witherspoon*-excludables") violates the fair-cross-section requirement. It does not violate that requirement, we said, to disqualify a group for a reason that is related "to the ability of members of the group to serve as jurors *in a particular case*." 476 U. S., at 175 (emphasis added). The "representativeness" constitutionally required at the venire stage can be disrupted at the jury-panel stage to serve a State's "legitimate interest." *Ibid.* In *Lockhart* the legitimate interest was "obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Id.*, at 175–176. Here the legitimate interest is the assurance of impartiality that the system of peremptory challenges has traditionally provided.

The rule we announce today is not only the only plausible reading of the text of the Sixth Amendment, but we think it best furthers the Amendment's central purpose as well. Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored. This goal, it seems to us,

would positively be obstructed by a petit jury cross-section requirement which, as we have described, would cripple the device of peremptory challenge. We have acknowledged that that device occupies "an important position in our trial procedures," *Batson*, 476 U. S., at 98, and has indeed been considered "a necessary part of trial by jury," *Swain* v. *Alabama*, 380 U. S., at 219. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of "eliminat-[ing] extremes of partiality on both sides," *ibid.*, thereby "assuring the selection of a qualified *and unbiased* jury," *Batson*, *supra*, at 91 (emphasis added).[2]

Petitioner seeks to minimize the harm that recognition of his claim would cause to the peremptory challenge system by assuring us that the striking of identifiable community groups other than blacks need not be accorded similar treatment. That is a comforting assurance, but the theory of petitioner's case is not compatible with it. If the goal of the Sixth Amendment is representation of a fair cross section of the community on the petit jury, then intentionally using peremptory challenges to exclude *any* identifiable group should be impermissible—which would, as we said in *Lockhart*, "likely require the elimination of peremptory challenges." 476 U. S., at 178.

JUSTICE MARSHALL argues that prohibiting purposeful peremptory challenge of members of distinctive groups "would leave the peremptory challenge system almost entirely untouched" because the Court is unlikely to recognize many groups as "distinctive." *Post*, at 502. Misplaced optimism on this subject is cost free to those who in any event "would

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[2]JUSTICE STEVENS states that a prosecutor's "assumption that a black juror may be presumed to be partial simply because he is black . . . is impermissible since *Batson*." *Post*, at 519. It is undoubtedly true that, since *Batson*, such an assumption violates the Equal Protection Clause. That has nothing to do with whether it (and, necessarily, many other group-based assumptions) violates the Sixth Amendment.

. . . eliminat[e] peremptory challenges entirely in criminal cases," *Batson*, *supra* at 107 (MARSHALL, J., concurring), but we see no justification for indulging it. To support his prediction, JUSTICE MARSHALL states that the only groups the Court has recognized as distinctive thus far have been women and certain racial groups, *post*, at 502 (citing *Lockhart*, 476 U. S., at 175). That is true enough, but inasmuch as those groups happen to constitute *all* the groups we have considered in the venire context, what it demonstrates is not how difficult it is to meet our standards for distinctiveness, but how few groups are systematically excluded from the venire. As we have discussed, however, many groups are regularly excluded from the petit jury through peremptory challenge. *Lockhart* itself suggests, quite rightly, that even so exotic a group as "*Witherspoon*-excludables" would be a distinctive group whose rejection at the venire stage would violate the Sixth Amendment. 476 U. S., at 176. If, as JUSTICE MARSHALL would have it, rejection at the venire stage and rejection at the panel stage are one and the same, there is every reason to believe that many commonly exercised bases for peremptory challenge would be rendered unavailable.

Dispassionate analysis does not bear out JUSTICE MARSHALL's contentions that we have "ignor[ed] precedent after precedent," *post*, at 503, "reject[ed] . . . the principles underlying a whole line of cases," *ibid.*, and suffer from "selective amnesia with respect to our cases in this area," *post*, at 500. His dissent acknowledges that the fair-cross-section decisions it discusses—*Taylor*, *Duren*, and *Lockhart*—"referr[ed] to exclusion of prospective jurors from venires, not their exclusion from petit juries by means of peremptory challenges," *post*, at 496. It nonetheless counts those cases as "well-grounded precedents," *post*, at 490, because "the particular context does not affect the analysis," *post*, at 496. That may be the dissent's view, but it was assuredly not the view expressed in the cases themselves. As noted earlier, *all three*

of those opinions specifically disclaimed application of their analysis to the petit jury. See *supra*, at 482–483. Last Term, in *Teague* v. *Lane*, 489 U. S. 288 (1989), we were asked to decide the very same question we decide today—"whether," as JUSTICE O'CONNOR's plurality opinion put it, "the Sixth Amendment's fair cross section requirement should now be extended to the petit jury." *Id.*, at 292. We did not reach that question because the four-Justice plurality, with JUSTICE WHITE agreeing as to the result, held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," *id.*, at 310, and found that in asserting a fair-cross-section requirement at the petit jury stage petitioner was urging adoption of such a "new rule," *id.*, at 301—that is, a rule producing a result "not *dictated* by [prior] precedent," *ibid.* (emphasis in original). Though there were four Justices in dissent, only two of them expressed the view that a petit jury fair-cross-section requirement *was* compelled by prior precedent. See *id.*, at 340–344 (BRENNAN, J., dissenting). In short, there is no substance to the contention that what we hold today "ignor[es] precedent after precedent."

JUSTICE MARSHALL's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly. It is not remotely true that our opinion today "lightly . . . set[s] aside" the constitutional goal of "eliminat[ing] racial discrimination in our system of criminal justice." *Post*, at 503–504. The defendant in this case is not a black man, but a convicted white rapist who seeks to use the striking of blacks from his jury to overturn his conviction. His Sixth Amendment claim would be just as strong if the object of the exclusion had been, not blacks, but postmen, or lawyers, or clergymen, or any number of other identifiable groups. Race as such has nothing to do with the legal issue in this case. We do not hold that the systematic exclusion of

blacks from the jury system through peremptory challenges is lawful; it obviously is not, see *Batson*, *supra*. We do not even hold that the exclusion of blacks through peremptory challenges in this particular trial was lawful. Nor do we even hold that this particular (white) defendant does not have a valid constitutional challenge to such racial exclusion.[3] All we hold is that he does not have a valid constitutional challenge *based on the Sixth Amendment*—which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics.

To be sure, as JUSTICE MARSHALL says, the Sixth Amendment sometimes operates "as a weapon to combat racial discrimination," *post*, at 504, n. 2—just as statutes against murder sometimes operate that way. But it is no more reasonable to portray this as a civil rights case than it is to characterize a proposal for increased murder penalties as an antidiscrimination law. Since *only* the Sixth Amendment claim, and not the equal protection claim, is at issue, the question before us is not whether the defendant has been unlawfully discriminated against because he was white, or whether the excluded jurors have been unlawfully discrimi-

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[3] As noted at the outset, petitioner did not seek review of the denial of his Equal Protection Clause claim. Our grant of certiorari was limited to the Sixth Amendment question, and the equal protection question has been neither briefed nor argued.

JUSTICE STEVENS' contention that the equal protection question should nonetheless be decided, *post*, at 506–507, contradicts this Court's Rule 14.1(a), which states: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." It is almost unprecedented to accept certiorari on a question involving one constitutional provision and then to decide the case under a different constitutional provision neither presented, briefed, nor argued. The exception was *Batson*, where, as accurately described in Chief Justice Burger's dissent, "the Court depart[ed] dramatically from its normal procedure without any explanation." 476 U. S., at 115. JUSTICE STEVENS asserts that *Batson* "makes it appropriate" to reach the equal protection claim here, *post*, at 507. We decline to convert *Batson* from an unexplained departure to an unexplained rule.

nated against because they were black, but whether the defendant has been denied the right to "trial . . . by an impartial jury." The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds.

The judgment of the Illinois Supreme Court is

Affirmed.

JUSTICE KENNEDY, concurring.

I join JUSTICE SCALIA's opinion and agree with him that we must reject petitioner's claim that the fair-cross-section requirement under the Sixth Amendment was violated. The contention is not supported by our precedents and admits of no limiting principle to make it workable in practice. I write this separate concurrence to note that our disposition of the Sixth Amendment claim does not alter what I think to be the established rule, which is that exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights. *Batson* v. *Kentucky*, 476 U. S. 79 (1986). I agree with JUSTICE MARSHALL, *post*, at 490–491, that this case does not resolve the question whether a defendant of a race different from that of the juror may challenge the race-motivated exclusion of jurors under the constitutional principles that underpin *Batson*. Like JUSTICE MARSHALL, I find it essential to make clear that if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit.

Many of the concerns expressed in *Batson*, a case where a black defendant objected to the exclusion of black jurors, support as well an equal protection claim by a defendant whose race or ethnicity is different from the dismissed juror's. To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that racial exclusion of citizens from the duty, and honor, of jury service will

be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees. I see no obvious reason to conclude that a defendant's race should deprive him of standing in his own trial to vindicate his own jurors' right to sit. As JUSTICE MARSHALL states, *Batson* is based in large part on the right to be tried by a jury whose members are selected by nondiscriminatory criteria and on the need to preserve public confidence in the jury system. These are not values shared only by those of a particular color; they are important to all criminal defendants.

Support can be drawn also from our established rules of standing, given the premise that a juror's right to equal protection is violated when he is excluded because of his race. See *Batson*, *supra*, at 87. Individual jurors subjected to peremptory racial exclusion have the legal right to bring suit on their own behalf, *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970), but as a practical matter this sort of challenge is most unlikely. The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to set in motion the arduous process needed to vindicate his own rights. We have noted that a substantial relation may entitle one party to raise the rights of another. See *Singleton* v. *Wulff*, 428 U. S. 106, 114–115 (1976). An important bond of this type links the accused and an excluded juror. In sum, the availability of a Fourteenth Amendment claim by a defendant not of the same race as the excluded juror is foreclosed neither by today's decision nor by *Batson*.

Batson did contain language indicating that the peremptory challenge of jurors of the same race as the defendant presents a different situation from the peremptory challenge of jurors of another race, but I consider the significance of the discussion to be procedural. An explicit part of the eviden-

tiary scheme adopted in *Batson* was the defendant's showing that he was a member of a "cognizable racial group," and that the excluded juror was a member of the same group. See 476 U. S., at 96–98. The structure of this scheme rests upon grounds for suspicion where the prosecutor uses his strikes to exclude jurors whose only connection with the defendant is the irrelevant factor of race. It is reasonable in this context to suspect the presence of an illicit motivation, the "belief that blacks could not fairly try a black defendant." *Id.*, at 101 (WHITE, J., concurring). Where this obvious ground for suspicion is absent, different methods of proof may be appropriate.

With these observations touching upon the matters raised in JUSTICE MARSHALL's dissent, I concur in the opinion of the Court.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

The Court decides today that a prosecutor's racially motivated exclusion of Afro-Americans from the petit jury does not violate the fair-cross-section requirement of the Sixth Amendment. To reach this startling result, the majority misrepresents the values underlying the fair-cross-section requirement, overstates the difficulties associated with the elimination of racial discrimination in jury selection, and ignores the clear import of well-grounded precedents. I dissent.

I

Before proceeding to what the Court does decide, I pause to note what it does not. For reasons that are not immediately apparent, petitioner expressly disavows the argument that a white defendant has standing to raise an equal protection challenge, based on our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), to a prosecutor's racially motivated peremptory strikes of Afro-American venirepersons. See Brief for Petitioner 6, 17; Reply Brief for Petitioner 2; Tr. of

Oral Arg. 21–23. Our grant of certiorari did not encompass the question whether a white defendant has standing to make a *Batson* claim, see Pet. for Cert. 1, and the parties did not brief the question; it is therefore not before us today. Recognizing this, the majority explicitly leaves open the question whether a white defendant is without standing to make such a claim. See *ante*, at 487. Another of the majority's statements, however, could be read to prefigure how the Court would resolve that question if faced with it. See *ante*, at 477 (implying "a requirement of correlation between the group identification of the defendant and the group identification of excluded venire members" for standing to raise the equal protection claim). It is important, therefore, briefly to examine the *Batson* question.

As a majority of this Court has now concluded, a close reading of *Batson* shows that a defendant's race is irrelevant to his standing to raise the equal protection claim recognized in that case. See *infra* this page and 492; *ante*, at 488–490 (KENNEDY, J., concurring); *post*, at 505–508 (STEVENS, J., dissenting). Because Batson was Afro-American, it is not surprising that the Court held that he could make out a prima facie case of an equal protection violation by showing, *inter alia*, that "the prosecutor ha[d] exercised peremptory challenges to remove from the venire members of the defendant's race." 476 U. S., at 96. Nowhere did the Court state, however, that a white defendant could not make out a prima facie case based upon the exclusion of Afro-American jurors, and the logic of the Court's decision would not have supported such a conclusion.

The fundamental principle undergirding the decision in *Batson* was that "a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" *Id.*, at 84 (quoting *Swain* v. *Alabama*, 380 U. S. 202, 203–204 (1965)). This principle, Justice Powell explained for the Court, has three bases: the right of the de-

fendant "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U. S., at 85–86 (citing *Martin* v. *Texas*, 200 U. S. 316, 321 (1906), and *Ex parte Virginia*, 100 U. S. 339, 345 (1880)); the right of a member of the community not to be assumed incompetent for and be excluded from jury service on account of his race, 476 U. S., at 87 (citing *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880), *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 329–330 (1970), and *Neal* v. *Delaware*, 103 U. S. 370, 386 (1881)); and the need to preserve "public confidence in the fairness of our system of justice," 476 U. S., at 87 (citing *Strauder*, *supra*, at 308, *Ballard* v. *United States*, 329 U. S. 187, 195 (1946), and *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari)). Although the majority implies that a defendant has a greater Fourteenth Amendment interest in being tried by a jury from which members of his race (as opposed to people of other races) have not been excluded, *ante*, at 476–477, I do not read the majority to suggest that a defendant of a race different from that of the people excluded has *no* interest in the racial composition of his jury. More fundamentally, Batson was permitted to raise not only his rights, but also those of the members of the venire and of the general public. If Batson could do so, there is no reason a white defendant cannot do so as well.

In any event, the question whether a defendant's race affects his standing to invoke *Batson* is one on which the Court has not ruled. For the reader who seeks guidance on how the Court would rule if the issue were presented and argued, the agreement of five Justices that a defendant's race is irrelevant to the Fourteenth Amendment standing inquiry is far more illuminating than the majority's veiled intimations and cryptic turns of phrase.

II

The issue that *is* presented and decided today is whether a prosecutor's exercise of peremptory challenges for the sole

purpose of excluding Afro-Americans from a petit jury contravenes the Sixth Amendment. I think that it does.

The fundamental premise underlying the majority's analysis in this case is the assertion that the sole purpose of the Sixth Amendment's jury trial requirement is to secure for the defendant an impartial jury. The majority defends this thesis by constructing a false dichotomy: the fair-cross-section requirement *either* protects impartiality *or* guarantees a petit jury that mirrors the community from which it is drawn. From these two options, the majority selects impartiality as its governing principle. See *ante*, at 480 ("The Sixth Amendment requirement of fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)"). The remainder of its analysis proceeds from and is dependent upon the assumption that impartiality is the sole end of the fair-cross-section requirement. That assumption is flatly false, and the conclusion to which it leads is one that I cannot imagine that even the majority would accept in all its implications.[1]

A

The Sixth Amendment guarantees criminal defendants the right to a trial "by an impartial jury." Obviously, then, impartiality is one concern addressed by the Amendment. Just as self-evident is the proposition that a criminal defendant is entitled to have his case decided by a "jury." We have made clear that "jury" is a term of art, and that a body of people assembled to decide a case must meet certain constitutional minimums before it qualifies as a "jury" in the constitutional sense. See, *e. g.*, *Ballew* v. *Georgia*, 435 U. S. 223 (1978) (holding, without relying on the impartiality require-

[1] Indeed, as JUSTICE STEVENS has persuasively shown, *post*, at 508–520 (dissenting opinion), even if impartiality were the only goal the fair-cross-section requirement is designed to serve, peremptory exclusion of Afro-American jurors on account of their race makes a truly impartial jury impossible to achieve and thus violates the Sixth Amendment.

ment, that a five-person "jury" is insufficient to satisfy Constitution's demand of a "jury" trial). Contrary to the majority's implication, the fair-cross-section requirement is not based on the constitutional demand for impartiality; it is founded on the notion that what is denominated a "jury" is not a "jury" in the eyes of the Constitution unless it is drawn from a fair cross section of the community.

Thus, in *Taylor* v. *Louisiana*, 419 U. S. 522, 527 (1975), we stated:

> "[T]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in *Smith* v. *Texas*, 311 U. S. 128, 130 (1940), that '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government.'"

Indeed, we recognized in *Taylor* that the fair-cross-section requirement and the impartiality requirement provide distinct protections, and that the Sixth Amendment guarantees both. *Id.*, at 536 (acknowledging the "Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community").

That the two protections are distinct is shown as well by *Duren* v. *Missouri*, 439 U. S. 357 (1979), where we reaffirmed *Taylor* in holding that a state law permitting women, but not men, to opt out of jury service violated the fair-cross-section requirement. Duren did not contend that any juror was biased against him. Rather, he claimed that his right to a jury trial was violated by the *de facto* exclusion of women from his venire. Only the dissent in *Duren* suggested that the Sixth Amendment serves nothing but impartiality. 439 U. S., at 370–371, and n. (opinion of REHNQUIST, J.).

More recently, in *Lockhart* v. *McCree*, 476 U. S. 162 (1986), the Court, in an opinion written by JUSTICE REHNQUIST, again confirmed that the fair-cross-section requirement and the impartiality requirement are different constitutional mandates serving different purposes. The Court therefore analyzed the two requirements separately, never suggesting that its resolution of the impartiality question in any way affected its resolution of the fair-cross-section issue. Compare *id.*, at 174–177 (class of prospective jurors unalterably opposed to the death penalty does not constitute "distinctive group" for purposes of the fair-cross-section requirement), with *id.*, at 177–184 (rejecting "alternative" argument that resulting jury was "slanted" in favor of a guilty verdict in violation of impartiality requirement).

B

Our precedents thus belie the majority's assertion that the fair-cross-section requirement is merely "a means of assuring" impartiality. *Ante*, at 480. Rather, the fair-cross-section requirement serves entirely different purposes. In *Lockhart*, the Court identified these purposes as "(1) 'guard-[ing] against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system,' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'" 476 U. S., at 174–175 (quoting *Taylor*, *supra*, at 530–531).

Had the majority in this case acknowledged that the fair-cross-section requirement serves these purposes, it would have been hard pressed to deny that the exclusion of Afro-Americans from petit juries on the basis of their race violates the Sixth Amendment. Indeed, in *Lockhart* itself, the Court noted that the exclusion of

> "such groups as blacks, . . . women, . . . and Mexican-Americans . . . from jury service clearly contravene[s] all three of the aforementioned purposes of the fair-cross-section requirement. Because these groups [are] excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community. In addition, the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably [gives] rise to an 'appearance of unfairness.' Finally, such exclusion improperly deprive[s] members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases." 476 U. S., at 175 (citations omitted).

To be sure, the Court was referring to exclusion of prospective jurors from venires, not their exclusion from petit juries by means of peremptory challenges. But the particular context does not affect the analysis. A defendant's interest in obtaining the "commonsense judgment of the community" is impaired by the exclusion from his jury of a significant segment of the community; whether the exclusion is accomplished in the selection of the venire or by peremptory challenge is immaterial. *Batson* v. *Kentucky*, 476 U. S., at 86. A prosecutor's race-based peremptory challenge of all Afro-American venirepersons, no less than a State's exclusion of Afro-Americans from the venire, destroys even the possibility that this distinctive group will be represented on the defendant's petit jury.

Likewise, the second purpose animating the fair-cross-section requirement—preserving public confidence in the fairness of our criminal justice system—applies equally to the

selection of the petit jury as to the selection of the venire. Racially motivated peremptory challenges are as destructive of the public's perception that our system of criminal justice is fair as are exclusions of certain racial groups from the venire. *Id.*, at 87–88.

Finally, the goal of ensuring that no distinctive group be excluded from full participation in our criminal justice system is impaired when the prosecutor implies, through the use of racially motivated peremptory challenges, that he does not trust Afro-Americans to be fair enough or intelligent enough to serve on the case he is trying. *Id.*, at 87. That the juror may eventually be seated on a jury in another case is immaterial; no one can be expected to perceive himself to be a full participant in our system of criminal justice, or in our society as a whole, when he is told by a representative of the government that, because of his race, he is too stupid or too biased to serve on a particular jury. That he might not have to suffer such an indignity in *every* case is not an answer to the injury inflicted by the one instance of racism he is forced to endure.

Thus, no rational distinction can be drawn in the context of our fair-cross-section jurisprudence between the claims we accepted in *Taylor* and *Duren* and the claim at issue here. The majority avoids reaching this conclusion only by the expedient of ignoring the clear import of our cases. It justifies its refusal to confront the logic underlying those cases by suggesting that "*all three of those opinions [Taylor, Duren,* and *Lockhart]* specifically disclaimed application of their analysis to the petit jury." *Ante*, at 485–486. The majority's semantic games aside, these cases do not suggest that fair-cross-section principles are inapplicable to the petit jury; the cases simply recognize that those principles do not mandate a petit jury that mirrors the population of distinctive groups in the community. See *Taylor*, *supra*, at 538 ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive

groups in the population"); *Duren*, 439 U. S., at 364, n. 20 (the fair-cross-section "requirement does not mean 'that petit juries actually chosen must mirror the community'") (quoting *Taylor*, *supra*, at 538); *Lockhart*, *supra*, at 173 (Court has not required that petit juries "reflect the composition of the community at large"). Indeed, while the *Lockhart* Court noted that we have not in the past "invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges," *ibid.*, it also recognized that we have applied that principle to the petit jury in holding unconstitutional petit juries of fewer than six members on the ground that smaller juries do not "'truly represen[t] their communities,'" *id.*, at 173, n. 14 (quoting *Ballew*, 435 U. S., at 239).

A "[d]ispassionate analysis" of our cases, *ante*, at 485, thus makes clear that fair-cross-section principles *do* apply to the petit jury. Moreover, I have shown, *supra*, at 495–498, and the majority does not attempt to deny, that when analyzed in terms of those principles, petitioner's claim is clearly meritorious. The conclusion the majority reaches thus rests entirely on its refusal to apply those principles to this case. So far as I can discern, that refusal, in turn, rests entirely on a claim the majority presents almost as an afterthought—that acceptance of Holland's argument would be the first step down a slippery slope leading to a criminal justice system in which trial judges would be required to engineer each jury to reflect, in its few members, all of the myriad demographic groups of which American society is composed. See, *e. g.*, *ante*, at 482–483, 484. Of course, as the majority is forced to admit, *ante*, at 484, petitioner disclaims any argument that such a regime is constitutionally compelled, or even possible. Thus, the majority is not frightened by petitioner's argument, but by the consequences that the majority fancies would flow from our acceptance of that argument.

The majority's apparent concern that applying the fair-cross-section requirement to the petit jury would, as a logical

matter, require recognition of a right to a jury that mirrors the population of distinctive groups in the community is chimerical. Although the purposes of the fair-cross-section requirement cannot be served unless prosecutors are precluded from exercising racially motivated peremptory challenges of prospective jurors, see *supra*, at 494–498, those purposes do not support an argument for any more than a fair possibility that the petit jury will reflect the population of Afro-Americans (or of any other distinctive group). They do not support, in other words, the claim that any particular jury must comprise some specific number of members of each distinctive group. Only if prospective jurors are purposely excluded on account of their membership in a distinctive group—whether in the selection of the venire or in the prosecutor's exercise of peremptory challenges—is the defendant denied the possibility of a fair cross section of the community.

It is arguably true that the first purpose underlying the fair-cross-section requirement—the defendant's interest in obtaining the commonsense judgment of the community—would be served by a requirement that all distinctive groups in the community be represented on each petit jury. But see *post*, at 512, and n. 10 (STEVENS, J., dissenting) (showing that representative jury requirement might well *interfere* with a jury's expression of the commonsense judgment of the community). *Lockhart*'s second and third purposes, however, do not support such a requirement. The public is unlikely to perceive that our system of criminal justice is unfair simply because a particular jury does not represent every segment of the community, especially where the jury's composition is merely the result of a spin of the jury wheel. Public confidence is undermined by the appearance that the government is trying to stack the deck against criminal defendants and to remove Afro-Americans from jury service solely because of their race. No similar inference can be drawn from the operations of chance. Similarly, the fair-cross-section requirement's goal of ensuring that each dis-

tinctive group be a full participant in our system of criminal justice is simply not impaired when a juror is seated, by the luck of the draw, on one panel instead of on another.

Finally, this Court's refusal to read the fair-cross-section requirement as mandating a petit jury representing all of the community's distinctive groups is born not of principle, but of necessity, of the recognition that no such requirement could as a practical matter be enforced. As the Court stated in *Lockhart*, "[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." 476 U. S., at 173–174 (citing *Batson* v. *Kentucky*, 476 U. S., at 85–86, n. 6).

As we demonstrated in deciding *Batson*, however, it is emphatically *not* impossible to prohibit prosecutors from excluding Afro-American jurors on account of their race, and the majority does not suggest that such a prohibition would be more difficult to enforce in the circumstances presented by this case. To the extent that the limitations on the reach of the fair-cross-section requirement are those of feasibility, then, the Court's result in this case is indefensible.

Rather than join issue on the real arguments presented by this case—whether the several purposes served by the fair-cross-section requirement do or do not dictate that it apply in these circumstances—the majority seeks to avoid the issue by acting as if impartiality were the only goal of our fair-cross-section cases, despite this Court's repeated and explicit statements that such is not the case. In so doing, the majority glosses over not only a few, but quite literally *every single* fair-cross-section case that this Court has decided.

C

If the majority's selective amnesia with respect to our cases in this area is surprising, its suggestion that recognition of petitioner's Sixth Amendment claim "would cripple the device of peremptory challenge," *ante*, at 484, can only be

described as staggering. The majority suggests that (1) the peremptory challenge system is "venerable" and essential to jury impartiality, *ante*, at 481–482; (2) limitations on a prosecutor's power peremptorily to challenge jurors on *any* basis, including race, would effectively destroy that system, *ante*, at 483–485; and (3) the Sixth Amendment is therefore not implicated by racially motivated peremptory exclusions, *ante*, at 483, 487. Each step in the majority's logic is plainly fallacious.

First, as even the majority admits, *ante*, at 481–482, this Court has repeatedly recognized that a State need not permit peremptory challenges. See, *e. g.*, *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). It is difficult to reconcile that holding with the notion that peremptory challenges are somehow essential to an impartial jury, the right to which *is* constitutionally protected. That "[o]ne could plausibly argue" that the peremptory challenge system is constitutionally compelled, *ante*, at 481, is hardly an answer to the contrary statements in our cases. Plausible arguments can be made for many erroneous propositions, but that does not make them any less wrong. Moreover, JUSTICE STEVENS clearly demonstrates that invocations of our "venerable" peremptory challenge system are insufficient to defeat Holland's claims. See *post*, at 517–518, and n. 15.

In support of the second step in its analysis, the majority quotes *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965), for the proposition that even racially motivated peremptory challenges are essential to eliminate "'extremes of partiality on both sides.'" *Ante*, at 484. What the majority neglects to mention is that *Batson*, in overruling *Swain* in part, expressly rejected the proposition for which the majority cites *Swain:*

> "The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. . . . While we recognize, of course, that the peremptory challenge occupies an important position in our

> trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision . . . furthers the ends of justice." 476 U. S., at 98–99 (footnote omitted).

A prohibition on the use of peremptory challenges purposely to exclude members of distinctive groups on the basis of their "distinctive" attribute would leave the peremptory challenge system almost entirely untouched. The majority's exaggerated claim that "postmen, or lawyers, or clergymen" are distinctive groups within the meaning of our fair-cross-section cases, *ante*, at 486, will no doubt be quickly interred if ever a litigant reaches the Supreme Court claiming that such groups are "distinctive." To date, at least, this Court has found only women and certain racial minorities to have the sorts of characteristics that would make a group "distinctive" for fair-cross-section purposes. See *Lockhart*, *supra*, at 175 (citing cases).

More fundamentally, the majority's conclusion proves far more than I think even it intends. Unless it is limited by some principle that is not apparent on its face, the Court's decision today provides that the fair-cross-section requirement is unconcerned even with a prosecutor's systematic use of peremptory challenges to exclude Afro-American prospective jurors on the ground that they, as a class, lack the intelligence or impartiality fairly to fill the juror's role. Indeed, there is no principle by which the majority could distinguish such a case from a similar policy of the state attorney general's office. Although I cannot conceive that the majority intends any such holding, the lack of a limiting principle makes me wonder on what basis I should be so sanguine.

Perhaps the most obvious answer to the majority's concerns about destruction of the peremptory challenge system is that the acceptance of Holland's argument in this case will have absolutely no effect on the peremptory challenge system. We have held that the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges to exclude Afro-American jurors on the basis of their race. *Batson*, 476 U. S. 79 (1986). Five Members of the Court today make clear that the race of the defendant is irrelevant to the operation of that prohibition. See *supra*, at 491–492 (MARSHALL, J., joined by BRENNAN and BLACKMUN, JJ., dissenting); *ante*, at 488–490 (KENNEDY, J., concurring); *post*, at 505–508 (STEVENS, J., dissenting). Whatever "damage" my interpretation of the Sixth Amendment would do to the peremptory challenge system has already been done under the Fourteenth Amendment. The practical effect of this case (in the arena with which the majority is concerned) is nil.

III

The majority today insulates an especially invidious form of racial discrimination in the selection of petit juries from Sixth Amendment scrutiny. To reach this result, the majority chooses to pretend that it writes on a blank slate, ignoring precedent after precedent. The majority then conjures up specters—of the dreaded "representative jury" requirement and of the destruction of our "venerable" system of peremptory challenges—as though they were real sources of concern. Our recent refusal in *Batson* to permit such fantastic fears to override our constitutional duty in the equal protection context makes clear, however, that these apparitions vanish on close examination.

Even had the majority marshaled the sorts of arguments that normally accompany the rejection of the principles underlying a whole line of cases, I would remain dubious. The elimination of racial discrimination in our system of criminal justice is not a constitutional goal that should lightly be

set aside. Because the majority apparently disagrees,[2] I dissent.

JUSTICE STEVENS, dissenting.

When jury selection began for petitioner Daniel Holland's trial, he was presented with up to 40 jurors eligible for service. In accordance with Illinois law, the panel was blindly drawn from an active jury list,[1] which in turn was composed at random,[2] from a broad cross section of the com-

[2] The majority considers "rando[m]" my suggestion that its opinion today signals a retreat from our previous efforts to eradicate racial discrimination. *Ante*, at 486. Our cases have repeatedly used the Sixth Amendment's fair-cross-section requirement as a weapon to combat racial discrimination. See *supra*, at 493–495. Yet today, the majority says that the Sixth Amendment is no more concerned with discrimination against Afro-Americans than it is with discrimination against "postmen." *Ante*, at 486. The majority concludes that "[r]ace as such has nothing to do with the legal issue in this case." *Ibid.* I read these statements as a retreat; that the majority has so little understanding of our Sixth Amendment jurisprudence that it considers that criticism "rando[m]" is, if anything, proof that it is right on the mark.

[1] Illinois provides two methods of drawing petit jurors—both random—for single county circuits and other than single county circuits respectively. The provision applicable to petitioner's case, Ill. Rev. Stat., ch. 78, ¶ 32.1 (1987), provides in pertinent part:

"In single county circuits, the chief judge of the circuit court of the county shall certify to the clerk of the court the number of petit jurors required each month. The clerk shall then repair to the office of the jury commissioners and there, in the presence of the persons mentioned in Section 8 of this Act, proceed to draw by lot the necessary number of names from those made available for such drawing as in Section 8 of this act provided."

The record is somewhat unclear as to the number of prospective jurors drawn for petitioner's petit jury. See Brief for Petitioner 2 (30, 35, or 40 prospective jurors).

[2] Ill. Rev. Stat., ch. 78, ¶ 31 (1987):

"In such manner as may be prescribed by rules to be adopted by majority vote of said judges, the jury commissioners shall also:

"(a) From time to time prepare a secondary list to be known as the active jury list, containing such number of names taken from the general jury list, not less than 5% of the aggregate thereof, as shall be appointed by the said

munity.[3] At the commencement of *voir dire*, however, the State abandoned this neutral selection process. Rather than eliminating jurors on an individualized basis on the grounds of partiality or necessity, the prosecutor allegedly removed all the black jurors in the belief that no black citizen could be a satisfactory juror or could fairly try the case. As the Court acknowledges, that practice is "obviously" unlawful. *Ante*, at 487. The Court nonetheless does not reach the equal protection issue and, with respect to petitioner's Sixth Amendment claim, holds that the fair-cross-section principle of that Amendment does not "require anything beyond the inclusion of all cognizable groups in the venire." *Ante*, at 478. In my opinion, it is appropriate to review petitioner's equal protection claim, because a showing that black jurors have been eliminated solely on account of their race not only is sufficient to establish a violation of the Fourteenth Amend-

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rules, and in addition thereto, such other lists, to be known as period jury lists, as the said rules may require. Such period jury lists, if provided for, shall contain the names of prospective jurors who shall have indicated, either before or after being summoned for jury duty, at what time of the year they would most conveniently serve. The active jury list and, except as to the names of persons certified back by the clerk of the court as provided in Section 10 of this act, the period jury lists, shall be prepared by selecting every twentieth name, or other whole number rate necessary to obtain the number required, or, in counties having a population greater than 1,000,000, in a manner prescribed by the judge in charge of jury selection, from the general jury list which shall be arranged by towns or precincts for this purpose. The count shall run continuously rather than starting over with each town or precinct."

[3] ¶ 25:

"The said commissioners upon entering upon the duties of their office, and every 4 years thereafter, shall prepare a list of all legal voters or if they desire it may include the Illinois driver's license holders of each town or precinct of the county possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners."

At the time of petitioner's trial, Illinois provided exemptions, common to many States, for public officials, practicing physicians, and practicing attorneys, among others. ¶ 4 (repealed 1987).

ment but also is sufficient to establish a violation of the Sixth Amendment. A jury that is the product of such a racially discriminatory selection process cannot possibly be an "impartial jury" within the meaning of the Sixth Amendment.

I

Petitioner presented two arguments to the Illinois Supreme Court in support of his claim that the racially discriminatory exclusion of black jurors from his jury violated the Federal Constitution. First, he argued that the discriminatory exclusion of all the potential black jurors from his jury violated his personal right under the Sixth Amendment to a jury drawn from a cross section of the community. Second, he argued that the State's discriminatory use of peremptory challenges also violated the jurors' equal protection rights which he had third-party standing to assert. The state court addressed and rejected both claims on the merits.

The Court today decides only petitioner's Sixth Amendment claim and refuses to reach the equal protection argument, even though we are unanimous in agreeing that "the systematic exclusion of blacks from the jury system through peremptory challenges" is "obviously" unlawful. *Ante*, at 486–487; see *ante*, at 488 (KENNEDY, J., concurring); *ante*, at 491 (MARSHALL, J., dissenting). It does so because petitioner did not reiterate before this Court his argument that the discriminatory exclusion of black jurors violated the Equal Protection Clause. The same situation was presented in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). There, as here, the petitioner declined to challenge the discriminatory exercise of peremptory challenges on equal protection grounds, framing the issue at argument and in his briefs in Sixth Amendment terms. See *id.*, at 112–115 (Burger, C. J., dissenting).[4] We nonetheless prescinded the Sixth Amend-

[4]Just as the State in *Batson* argued that the Equal Protection Clause was central to petitioner's argument, so the State here has argued that petitioner's claim is an equal protection argument in disguise and that, as such, it is not meritorious. See Brief for Respondent 20–21, 24–27. I

ment question, *id.*, at 85, n. 4, and rested our decision in the petitioner's favor entirely on the Equal Protection Clause. Our decision in *Batson* makes it appropriate to begin our analysis by recognizing that petitioner's equal protection argument is plainly meritorious and entitles him to relief.

As JUSTICE KENNEDY and JUSTICE MARSHALL note, the concerns that were expressed in *Batson* are not properly confined to the context in which a defendant objects to the exclusion of jurors of his own race but support also "an equal protection claim by a defendant whose race or ethnicity is different from the dismissed juror's." *Ante*, at 488 (KENNEDY, J., concurring); see *ante*, at 491–492 (MARSHALL, J., dissenting). Our decision in *Batson* was based on the conclusion that "[r]acial discrimination in the selection of jurors harms not only the accused whose life or liberty they are summoned to try," but also "the excluded juror." 476 U. S., at 87. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Ibid.* Batson was a black citizen, but he had no interest in serving as a juror and thus was not a member of the excluded class. His standing to vindicate the interests of potential black jurors was based on his status as a defendant.[5] Indeed, the suggestion that only defendants of the same race or ethnicity as the excluded jurors can enforce the jurors' right to equal treatment and equal respect recognized in *Batson* is itself inconsistent with the central message of the Equal Protection Clause.[6]

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agree that the two claims overlap; indeed, the requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination.

[5] Although we stated in *Batson* that the defendant's right to have jurors "'indifferently chosen,'" 476 U. S., at 87 (quoting 4 Blackstone, Commentaries 350 (Cooley ed. 1899)), was also implicated by the discriminatory selection mechanism, we declined to rest our decision on the defendant's personal right to an impartial jury. 476 U. S., at 85, n. 4.

[6] As one commentator has noted:

"If defendants were allowed to challenge the exclusion only of members of their own races, a defendant whose grandparents were black, Hispanic, Asian, and Native American apparently would be permitted to challenge

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case." *Id.*, at 89. As JUSTICE KENNEDY states, while the inference that the discriminatory motive is at work is stronger when the excluded jurors are of the same race or ethnicity as the defendant, the discriminatory use of peremptory challenges is not limited to that situation but may be present when, as here, the excluded jurors are not of the same race as the defendant. *Ante*, at 490 (concurring opinion). Petitioner, however, was not permitted to present any evidence to support his claim because the state court ruled that he did not have standing to assert the rights of the excluded jurors. For the reasons stated by JUSTICE KENNEDY, that ruling was plainly wrong. My opinion, however, that petitioner should have been permitted to prove that the exclusion of black jurors violated the Equal Protection Clause also leads me to the conclusion that petitioner should be entitled to prove that the State has violated the fair-cross-section principle of the Sixth Amendment.

II

Fifteen years ago, in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), we unambiguously held that "the American concept of

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the exclusion of members of all of these groups. A defendant whose ancestry was less diverse would have less power to object to a prosecutor's racial discrimination. In determining precisely what ancestry would qualify a defendant as black, white, brown or red, courts might find guidance in some older decisions of states that practiced *de jure* segregation, in the opinions of South African tribunals, and in the precedents of Nazi Germany." Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 191–192 (1989) (footnote omitted).

See also *Ristaino* v. *Ross*, 424 U. S. 589, 596, n. 8 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion").

the jury trial contemplates a jury drawn from a fair cross section of the community." *Id.*, at 527. Although *Taylor*'s reliance on the Sixth Amendment was novel, the constitutional principle that it vindicated was ancient. Long before *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), held that the Sixth Amendment is applicable to the States, it was "part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," *Smith* v. *Texas*, 311 U. S. 128, 130 (1940), and exclusion of a cognizable group from jury service was considered to "contraven[e] the very idea of a jury," *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 330 (1970).[7] We stated over a century ago—and have often reiterated since—

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[7] *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), relied on cases decided in the exercise of our supervisory power over the federal courts, as well as cases decided under the Equal Protection Clause. See *Ballard* v. *United States*, 329 U. S. 187 (1946); *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury"); *Glasser* v. *United States*, 315 U. S. 60, 85–86 (1942) ("[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative

that a defendant is entitled to "an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." *Ex parte Virginia*, 100 U. S. 339, 345 (1880) (citing *Strauder* v. *West Virginia*, 100 U. S. 303 (1880)). Just as the potential juror has the right not to be excluded from jury service solely on account of race, so "[a]n accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Cassell* v. *Texas*, 339 U. S. 282, 287 (1950) (plurality opinion); see also *id.*, at 295 (Frankfurter, J., concurring) ("The prohibition of the Constitution against discrimination because of color does not require in and of itself the presence of a Negro on a jury. . . . The basis of selection cannot con-

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group are undermining processes weakening the institution of jury trial, and should be sturdily resisted").

It should not be surprising that the Sixth Amendment right to an impartial jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan* v. *Louisiana*, 391 U. S., at 156, guarantees not only impartial jurors but also procedural safeguards such as a selection mechanism that is fair and permits the judgment of the community to be brought to bear on the case. Our law recognizes as much in several other respects. Even though each individual juror might be impartial, the Sixth Amendment still requires that the jury have at least six members, *Ballew* v. *Georgia*, 435 U. S. 223 (1978), that the verdict be agreed upon by at least five jurors, *Burch* v. *Louisiana*, 441 U. S. 130 (1979), and that the defendant be accorded *voir dire*, *Turner* v. *Murray*, 476 U. S. 28, 36 (1986). See also *Tanner* v. *United States*, 483 U. S. 107, 127 (1987) (noting procedural safeguards that protect Sixth Amendment right to impartial jury). So it is with the fair-cross-section requirement. Although that requirement is not expressed in the text of the Sixth Amendment, it is inherent in its purpose that the defendant be judged by a body fairly selected and fully independent of the State. Indeed, in his first Inaugural Address, President Thomas Jefferson identified among the "principles [that] form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation," that of "trial by juries *impartially selected*." 3 Writings of Thomas Jefferson 322 (Memorial ed. 1903) (emphasis added).

sciously take color into account. Such is the command of the Constitution").

The fair-cross-section principle is central to our understanding of the Sixth Amendment. It has been upon the basis of the promise of the fair cross section that we have held that a six-person jury does not contravene the Constitution, see *Williams* v. *Florida*, 399 U. S. 78, 102 (1970) ("As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e. g.*, *Carter* v. *Jury Commission*, 396 U. S. 320, 329–330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one"), and that we have permitted nonunanimous verdicts, see *Apodaca* v. *Oregon*, 406 U. S. 404, 413 (1972) (opinion of WHITE, J.) ("All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and *from the juries ultimately drawn from those panels*") (emphasis added). It has also been on the basis of the fair-cross-section requirement that we have refused to scrutinize jury verdicts under the Equal Protection Clause, see *McCleskey* v. *Kemp*, 481 U. S. 279, 309–310 (1987) ("Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system. *Batson* v. *Kentucky*, 476 U. S. 79, 85 (1986). Our efforts have been guided by our recognition that 'the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice,' *Ex parte Milligan*, 4 Wall. 2, 123 (1866). Thus, it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880)").[8]

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[8] Our decision in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), should dispel any doubt that the fair-cross-section requirement and the prohibition against racial discrimination in the selection of juries expressed in such cases as *Batson* v. *Kentucky*, 476 U. S. 79 (1986), does not exist only to

The fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community. It does not dictate that any particular group or race have representation on a jury. See *Lockhart* v. *McCree*, 476 U. S. 162, 173, 178 (1986); *Taylor*, 419 U. S., at 538; *Apodaca*, 406 U. S., at 413 (opinion of WHITE, J.); *Cassell*, 339 U. S., at 286–287. The Constitution does not permit the easy assumption that a community would be fairly represented by a jury selected by proportional representation of different races any more than it does that a community would be represented by a jury composed of quotas of jurors of different classes. Cf. *Castaneda* v. *Partida*, 430 U. S. 482, 499–500 (1977); see also *id.*, at 503 (MARSHALL, J., concurring).[9] In fact, while a racially balanced jury would be representative of the racial groups in a community, the focus on race would likely distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class.[10] What the Con-

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protect black defendants. We there held that the jury system and the fair-cross-section principle were designed to eliminate any discrimination in the imposition of sentence based on the race of *the victim*.

[9] See *Mobile* v. *Bolden*, 446 U. S. 55, 88 (1980) (STEVENS, J., concurring in judgment) ("A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. . . . In the long run there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so"); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7) (dissenting opinion) ("Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group"), cert. denied, 409 U. S. 893 (1972).

[10] As one commentator has explained:

"So many identifiable interests have already emerged that the mathematical problems are almost insurmountable. The computer attempting to structure each jury would have to consider the race, sex, age, income, occupation, educational level, and religion of each juror—and perhaps other factors as well—in order to be sure that all relevant demographic

stitution does require is "a fair possibility for obtaining a representative cross-section of the community." *Williams* v. *Florida*, 399 U. S., at 100; see also *Ballew* v. *Georgia*, 435 U. S., at 236–237 (plurality opinion); *id.*, at 245 (WHITE, J., concurring in judgment).

Our previous cases explain the operation of the fair-cross-section requirement. In *Taylor*, we held unconstitutional a state provision that required women, but not men, to file a written declaration before they were placed in the jury pool. Because the provision was directed at excluding a distinctive group from jury service and was not based on any legitimate state purpose, it ran afoul of the "defendant's Sixth Amend-

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characteristics would be considered. Furthermore, a juror selected under this system might feel that she or he is filling some predetermined 'slot' and might attempt to give the view generally associated with those demographic characteristics rather than the juror's personal feelings about the case. The jurors might find it harder to work together as a group because they may be more conscious of their identified differences than the much stronger common bonds that unite them as people.

"The logical, and desirable, way to impanel an impartial and representative jury—and the method chosen by Congress—is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time. This approach safeguards the selection process from possible manipulation and ensures the independence of the jury. Such a randomly selected jury will not necessarily be 'impartial' in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community's attitudes, which is the best we can do. The random approach recognizes that our 'community' has enlarged because of the technological revolution that has provided us with communication links and common sources of information, but it also ensures that the diversity within our society is reflected on our juries because each population group is represented insofar as possible in proportion to its strength in the population." J. Van Dyke, Jury Selection Procedures 18 (1977).

Cf. Amar, Choosing Representatives by Lottery Voting, 93 Yale L. J. 1283, 1288–1289, 1293 (1984) (choice of jurors by random selection best replicates underlying distribution of views in community).

ment right to a jury drawn from a fair cross section of the community." 419 U. S., at 534. In *Duren* v. *Missouri*, 439 U. S. 357 (1979), a Missouri provision gave women an automatic exemption from jury service. Like the Louisiana provision in *Taylor*, Missouri's automatic exemption resulted in underrepresentation of women at the venire stage and was justified only by the stereotype that most women would be unable to serve because of their domestic responsibilities. 439 U. S., at 369.[11] We therefore held the provision unlawful.

Taylor and *Duren* insure that the jury pool and venire will be reasonably representative of the community. A reasonably representative jury pool, however, is not the ultimate goal of the Sixth Amendment: a State surely could not place all of its citizens in the jury pool, but then arbitrarily provide that members of certain cognizable groups would not be permitted to serve on a jury or could only serve if they overcame a special hurdle not applicable to other jurors. The Sixth Amendment guarantees the accused "an impartial jury," not just an impartial jury venire or jury pool. The State may remove jurors at any stage on the grounds, among others, that service would cause hardship to the individual or community, see *Taylor*, 419 U. S., at 534; *Rawlins* v. *Georgia*, 201 U. S. 638 (1906), or that the individual juror is unable to render an impartial verdict, see *Lockhart* v. *McCree*, 476 U. S., at 175; cf. *Swain* v. *Alabama*, 380 U. S. 202, 220 (1965) ("[T]he view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution'") (quoting *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887)). By the same token, however, the State may never arbitrarily remove jurors on a discriminatory basis unrelated to their ability to serve as jurors. Cf. *Lockhart*, 476 U. S., at 175.

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[11] As then-JUSTICE REHNQUIST noted in *Duren*, our analysis under the Sixth Amendment bore a marked similarity to analysis under the Equal Protection Clause. 439 U. S., at 371 (dissenting opinion).

The Sixth Amendment's protection is not so frail that it can be defeated by the State's creation of an additional level of selection.[12] Rather, by providing that juries be drawn through fair and neutral selection procedures from a broad cross section of the community, that Amendment insures a jury that will best reflect the views of the community—one that is not arbitrarily skewed for or against any particular group or characteristic.

Applying these principles, it is manifest that petitioner has stated a claim under the Sixth Amendment. Petitioner claimed at trial that the prosecutor systematically eliminated all the black jurors from his venire on the basis not that they were partial but that no black juror was competent to serve.[13] The state courts rejected this claim without a hearing, holding that the exercise of peremptory challenges can never violate the fair-cross-section requirement. Prior to our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), I assume that that ruling would have been correct and that petitioner's

[12] For example, if a State passed a statute mandating *voir dire* examination of all male white venirepersons before any female or black venirepersons, that statute would violate the Sixth Amendment as well as the Equal Protection Clause. Cf. *Smith* v. *Texas*, 311 U. S. 128 (1940). The statute would have an obvious tendency "systematically" to exclude female and black citizens from the petit jury directly contrary to the teaching of our Sixth Amendment cases.

[13] Petitioner also claimed that the jury venire and jury did not fairly represent the proportion of black persons in the community. App. 12–13. To the extent that his Sixth Amendment claim is based on the contention that the State prevented a "distinctive group in the community from being represented on his jury," *ante*, at 477–478, I agree with the Court that a defendant is not entitled to jurors of any particular race on his jury. The Sixth Amendment no more permits the prosecutor to remove a white juror on the categorical assumption that he will not represent the views of prospective black jurors than it permits the prosecutor to remove a black juror on the assumption that he is incompetent to serve. In both instances, the prosecutor would be determining qualification to serve on the basis of race, a determination that the prosecutor is not permitted to make. Cf. *Cassell* v. *Texas*, 339 U. S. 282, 287 (1950) (plurality opinion); *id.*, at 295 (Frankfurter, J., concurring).

argument would not have been successful. For *Swain* v. *Alabama*, 380 U. S. 202 (1965), had established a virtually irrebuttable presumption that "the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." *Id.*, at 222. That presumption could not be overcome by the prosecutor's use of peremptories to eliminate all the black jurors on the venire, *ibid.*, but only by a showing that "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223. Under previous law, the Illinois Supreme Court and this Court would have been correct in presuming along with the *Swain* Court that all peremptory challenges are exercised for nondiscriminatory reasons.

Batson, however, created an important, though limited, exception to the *Swain* presumption. Under *Batson*, a defendant is permitted to establish from "the totality of relevant facts," 476 U. S., at 94, that black jurors have been excluded on the basis of race and that the system of peremptory challenges has been operated in a discriminatory fashion. The peremptory challenge procedure, when it is used to remove members of a particular racial group, is no longer presumed to serve the State's interest in obtaining a fair and impartial jury. If a defendant is able to prove for equal protection purposes that the prosecutor's "strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try" the case, *id.*, at 101 (WHITE, J., concurring), and that the State is operating a discriminatory "selection procedure," *id.*, at 87, that same showing necessarily establishes that the defendant does not have a fair possibility of obtaining a representative cross section for Sixth Amendment purposes. As we have explained, *Batson* has under-

pinnings both in the juror's equal protection right to be free of discrimination and in the defendant's right to a fair and impartial factfinder:

> "By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. . . . Significantly, the new rule joins other procedures that protect a defendant's interest in a neutral factfinder. Those other mechanisms existed prior to our decisions in *Batson*, creating a high probability that the individual jurors seated in a particular case were free from bias." *Allen* v. *Hardy*, 478 U. S. 255, 259 (1986) (footnote omitted).

The operation of a facially neutral peremptory challenge procedure in a discriminatory manner is no less a violation of the defendant's Sixth Amendment right to a jury chosen from a fair cross section of the community than it is a violation of the juror's right to equal protection.[14]

The Court rejects petitioner's Sixth Amendment claim on the basis of three assumptions, two explicit and one implicit. First, it asserts that the tradition of peremptory challenges for the prosecution was "venerable" at the time of the ratification of the Sixth Amendment and thereby presumably im-

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[14] Justice Simon, dissenting in the Illinois Supreme Court, properly recognized the significance of our decision in *Batson:*

"Under the sixth amendment, a defendant is entitled to a fair cross-section of the community on the jury. *Taylor* v. *Louisiana*, 419 U. S. 522 (1975). This has been interpreted to guarantee that the jury venire be selected in a nondiscriminatory manner from a source fairly representative of the community, even though *Taylor* does not go so far as to guarantee a representative petit jury. But as already mentioned, *Batson* has added an additional dimension to this analysis: although a petit jury selected from a proper panel need not necessarily reflect a cross-section of the community, discriminatory tactics designed to manipulate the ultimate composition of the petit jury will no longer be tolerated." 121 Ill. 2d 136, 184–185, 520 N. E. 2d 270, 292 (1987).

mune from challenge. This assertion is both misleading[15] and an insufficient response to petitioner's claim that the State operated a system of discriminatory peremptory challenges. The Court has forsworn reliance on venerable history to give meaning to the Sixth Amendment's numerosity and unanimity requirements, see *Apodaca* v. *Oregon*, 406 U. S. 404 (1972); *Williams* v. *Florida*, 399 U. S. 78 (1970); the less venerable history of nondiscriminatory peremptory

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[15] Even as to the use of peremptory challenges to remove partial jurors, the Court's historical claims are significantly overstated. If the Court wishes to have it that the exercise of peremptory challenges by the prosecution has a venerable tradition, it will have to do better than Blackstone and the 1790 Congress. What Blackstone actually said with respect to peremptory challenges was that peremptory challenges were allowed the prisoner "in criminal cases, or at least in capital ones, . . . *in favorem vitae*," but that "[t]his privilege, of peremptory challenges, though granted to the prisoner, is denied to the king, by the statute of 33 Edw. I. st. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court." 4 W. Blackstone, Commentaries 346–347 (1769). The statute passed by the 1790 Congress, Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119, similarly recognized the defendant's right of peremptory challenges, but was silent with respect to the government's. See *United States* v. *Shackleford*, 18 How. 588 (1856). Although *United States* v. *Marchant*, 12 Wheat. 480 (1827), suggests that the government's common-law right to "stand aside" survived the 1790 Act, the Court has rejected the proposition that the 1790 Act reflects or "draws" with it the prosecutor's right of peremptory challenge. See 18 How., at 590. Contrary to the Court's contention, the prosecutor has not had the right of peremptory challenge "through two centuries in all the States." *Ante*, at 481. The exercise of peremptory challenges by the prosecution was a subject of debate throughout the 18th and 19th centuries and the two most populous States in the Nation's first century, New York and Virginia, did not permit the prosecutor peremptories until 1881 and 1919 respectively. See Van Dyke, *supra*, n. 10, at 147–150, 167; see also Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808, 827–828 (1989). It is also worthy of note that a clause providing the "right of challenge" was contained within the original draft of the Sixth Amendment but was eliminated by the Senate prior to ratification. See 1 Annals of Cong. 435 (1789).

challenges surely cannot resolve any conflict between the fair-cross-section requirement and the exercise of discriminatory peremptory challenges.

Second, the Court contends that the exercise of peremptory challenges always serves the State's "legitimate interest" in obtaining an impartial jury. *Ante*, at 483. That contention rests on the assumption that a black juror may be presumed to be partial simply because he is black—an assumption that is impermissible since *Batson*. Petitioner's claim is that the State may not operate a jury selection mechanism, including a system of peremptory challenges, that eliminates black jurors solely on account of race.[16] It hardly answers petitioner's claim to state that the system of peremptory challenges "traditional[ly]" operates "by allowing both the accused and the State to eliminate persons thought to be inclined against their interests." *Ante*, at 480.

Finally, the Court contends that recognition of the Sixth Amendment right "would cripple the device of peremptory challenge." *Ante*, at 484. The same argument was made in *Batson* in the same context: a defendant's claim that peremptory challenges were used to discriminate against black jurors. After our recognition that a defendant could bring an

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[16] The Court misconstrues petitioner's claim as one that the Sixth Amendment requires representation of all identifiable groups on the petit jury. *Ante*, at 484. Petitioner, however, makes no such claim. The Sixth Amendment does not forbid the State to remove jurors on the basis of partiality or other *relevant* individual characteristics. Even if the prosecutor's peremptory challenges based on such considerations, when aggregated, could be considered to result in the exclusion of a "cognizable group," that group by definition would be one that is ineligible for jury service for legitimate state reasons. The defendant's right to "a *fair* possibility" for obtaining a representative cross section would not be impaired. Petitioner does argue, however, that the State may not remove jurors for unconstitutional reasons or reasons relevant only to eliminating a group from the community eligible for jury service. That is, the State may not remove jurors solely on account of race. In that case, the defendant is being "unfairly" deprived of the opportunity for obtaining a cross section.

equal protection challenge to the removal of black jurors in a single case, it is difficult to see why recognition of a Sixth Amendment right would impose any additional burden. In any event, our answer to the State in *Batson* is a sufficient response to the Court here:

> "While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.
>
> "Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson* v. *Kentucky*, 476 U. S., at 98–99 (footnotes omitted).

I respectfully dissent.

SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ZEBLEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–1377. Argued November 28, 1989—Decided February 20, 1990

The Social Security Act authorizes the payment of Supplemental Security Income (SSI) benefits to, *inter alios*, a child who suffers from an impairment of "comparable severity" to one that would render an adult disabled. An adult is disabled if he is prevented from engaging in any *substantial* gainful activity by reason of certain medically determinable physical or mental impairments. Petitioner Secretary of Health and Human Services has created a five-step test to determine *adult* disability. At the test's third step, a claimant may be found to be disabled if medical evidence of his impairment matches or is equal to one of a listing of impairments presumed severe enough to preclude *any* gainful activity, thus making further inquiry unnecessary. However, since the listings' medical criteria are more restrictive than the statutory disability standard, an adult claimant who does not qualify at the third step may do so after showing, at the fourth and fifth steps, that he cannot engage in his past work or other work in the economy, given his age, education, and work experience. In contrast, the Secretary's test for determining whether a *child* claimant is disabled ends if the claimant cannot show that his impairment matches or is equal to a listed impairment, there being no further inquiry corresponding to the final, vocational steps of the adult test. Respondent Zebley, a child who was denied SSI benefits, brought a class action in the District Court challenging the child-disability regulations. The court granted summary judgment for the Secretary. The Court of Appeals vacated the judgment in part, finding the regulatory scheme to be inconsistent with the Act because the listings-only approach does not account for all impairments of "comparable severity" and denies child claimants the individualized functional assessment that the statutory standard requires and that the Secretary provides to adults.

Held: The child-disability regulations are inconsistent with the statutory standard of "comparable severity." Pp. 528–541.

(a) While adults who do not qualify under the listings still have the opportunity to show that they are disabled at the last steps of the Secretary's test, no similar opportunity exists for children, who are denied benefits even if their impairments are of "comparable severity"

to ones that would actually (though not presumptively) disable adults. Pp. 529–536.

(b) The Secretary's regulatory scheme—which applies the same approach to child-disability claimants and to claimants for widows' and widowers' Social Security disability benefits, despite the fact that the Act uses a stricter standard for widows' benefits—nullifies the congressional choice to link the child-disability standard to the more liberal test applied to adult disability claims. Pp. 536–537.

(c) The Secretary's argument that the listings-only approach is the only practicable way to determine whether a child's impairment is comparable to one that would disable an adult is rejected. Even if they were set at the statutory level of severity, no set of listings could ensure that child claimants would receive benefits whenever their impairments are of comparable severity to ones that would qualify an adult for benefits under the individualized functional analysis contemplated by the statute and provided to adults. That a vocational analysis is inapplicable to children does not mean that a *functional* analysis cannot be applied to them, since an inquiry into an impairment's impact on a child's normal daily activities is no more amorphous or unmanageable than an inquiry into the impact of an adult's impairment on his ability to perform any kind of substantial gainful work that exists in the economy. Moreover, the Secretary tacitly acknowledges that functional assessment of child claimants is possible in that some of his own listings are defined in terms of functional criteria, and the test for cessation of disability involves an examination of a child claimant's ability to perform age-appropriate activities. Pp. 538–541.

855 F. 2d 67, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 541.

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Merrill*, and *John F. Cordes*.

Richard P. Weishaupt argued the cause for respondents. With him on the briefs were *Jonathan M. Stein* and *Thomas D. Sutton*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns a facial challenge to the method used by the Secretary of Health and Human Services to determine whether a child is "disabled" and therefore eligible for benefits under the Supplemental Security Income Program, Title XVI of the Social Security Act, as added, 86 Stat. 1465, and amended, 42 U. S. C. § 1381 *et seq.* (1982 ed. and Supp. V).

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of Massachusetts, and *Suzanne E. Durrell* and *Judith Fabricant*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Douglas B. Baily*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Clarine Nardi Riddle*, Acting Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Herbert O. Reid, Sr.*, Acting Corporation Counsel for the District of Columbia, and *Charles L. Reischel*, Deputy Corporation Counsel, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *John P. Arnold*, Attorney General of New Hampshire, *Robert Abrams*, Attorney General of New York, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Joseph B. Meyer*, Attorney General of Wyoming; for the American Academy of Child and Adolescent Psychiatry et al. by *Leonard S. Rubenstein;* for the American Medical Association et al. by *Carter G. Phillips, Elizabeth H. Esty, Jack R. Bierig*, and *Stephan E. Lawton;* for the National Easter Seal Society et al. by *Robert E. Lehrer;* for Pennsylvania Protection and Advocacy et al. by *Janet F. Stotland* and *Robin Resnick;* for the Children's Defense Fund et al. by *Alice Bussiere, Marilyn Holle*, and *James D. Weill;* and for the National Organization of Social Security Claimants' Representatives by *Robert E. Rains* and *Nancy G. Shor.*

James Bopp, Jr., and *Thomas J. Marzen* filed a brief for the Medical Issues Task Force of the United Handicapped Federation et al. as *amici curiae.*

I

In 1972, Congress enacted the Supplemental Security Income (SSI) Program to assist "individuals who have attained age 65 or are blind or disabled" by setting a guaranteed minimum income level for such persons. 42 U. S. C. § 1381 (1982 ed.). The program went into effect January 1, 1974. Currently, about 2 million claims for SSI benefits are adjudicated each year. Of these, about 100,000 are child-disability claims.[1]

A person is eligible for SSI benefits if his income and financial resources are below a certain level, § 1382(a), and if he is "disabled." Disability is defined in § 1382c(a)(3) as follows:

> "(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).
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> "(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .
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> "(C) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

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[1] Social Security Administration, Office of Disability, Preliminary Staff Report: Childhood Disability Study, p. B–1 (Sept. 20, 1989).

This statutory definition of disability was taken from Title II of the Social Security Act, 70 Stat. 815, as amended, 42 U. S. C. § 423 *et seq.* (1982 ed. and Supp. V) (providing for payment of insurance benefits to disabled workers who have contributed to the Social Security Program). See §§ 423(d)(1)(A) and (d)(2)(A) (definitions of disability).

Pursuant to his statutory authority to implement the SSI Program,[2] the Secretary has promulgated regulations creating a five-step test to determine whether an *adult* claimant is disabled. See *Bowen* v. *Yuckert*, 482 U. S. 137, 140–142 (1987).[3] The first two steps involve threshold determinations that the claimant is not presently working and has an impairment which is of the required duration and which significantly limits his ability to work. See 20 CFR §§ 416.920(a) through (c) (1989). In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. See 20 CFR pt. 404, subpt. P, App. 1 (pt. A) (1989). If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the

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[2] Title 42 U. S. C. § 405(a), made applicable to Title XVI by 42 U. S. C. § 1383(d)(1) (1982 ed., Supp. V), reads:

"The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence . . . in order to establish the right to benefits hereunder."

[3] The regulations implementing the Title II disability standard, 42 U. S. C. § 423(d), at issue in *Yuckert*, and those implementing the identical Title XVI standard, § 1382c(a)(3), at issue in this case, are the same in all relevant respects. Compare 20 CFR §§ 404.1520–1530 with §§ 416.920–930 (1989).

national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits. §§ 416.920(e) and (f).

The Secretary's test for determining whether a *child* claimant is disabled is an abbreviated version of the adult test. A child qualifies for benefits if he "is not doing any substantial gainful activity," § 416.924(a), if his impairment meets the duration requirement, § 416.924(b)(1), and if it matches or is medically equal to a listed impairment, §§ 416.924(b)(2) and (3). In evaluating a child's claim, both the general listings and a special listing of children's impairments, 20 CFR pt. 404, subpt. P, App. 1 (pt. B) (1989), are considered. If a child cannot qualify under these listings, he is denied benefits. There is no further inquiry corresponding to the fourth and fifth steps of the adult test.

II

Respondent Brian Zebley, a child who had been denied SSI benefits, brought a class action in the United States District Court for the Eastern District of Pennsylvania to challenge the child-disability regulations.[4] His complaint alleges that the Secretary

> "has promulgated regulations and issued instructions . . . whereby children have their entitlement to SSI disability benefits based solely on the grounds that they have a listed impairment or the medical equivalent of a listed impairment . . . in contravention of the Act's requirement that a child be considered disabled 'if he suffers from any medically determinable physical or mental impairment of comparable severity' to that which disables

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[4] Respondents Joseph Love and Evelyn Raushi, two children who were denied benefits, are the other two named plaintiffs in this action. All three named plaintiffs' individual claims were eventually remanded to the Secretary by the District Court; only the class claims remain before this Court.

an adult under the program." Complaint in Civil Action No. 83–3314, ¶2.

The District Court, on January 10, 1984, certified a class of all persons "who are now, or who in the future will be, entitled to an administrative determination . . . as to whether supplemental security income benefits are payable on account of a child who is disabled, or as to whether such benefits have been improperly denied, or improperly terminated, or should be resumed." App. 26, 27.

The court in due course granted summary judgment in the Secretary's favor as to the class claims, ruling that the regulations are not "facially invalid or incomplete . . . and permi[t] the award of benefits in conformity with the intent of Congress." *Zebley* v. *Heckler*, 642 F. Supp. 220, 222 (1986). The Court of Appeals for the Third Circuit vacated in part that summary judgment. *Zebley ex rel. Zebley* v. *Bowen*, 855 F. 2d 67 (1988). The Third Circuit found the Secretary's regulatory scheme for child-disability benefits inconsistent with the statute because the listings-only approach of the regulations does not account for all impairments of "comparable severity" and denies child claimants the individualized functional assessment that the statutory standard requires and that the Secretary provides to adults. *Id.*, at 69. Although the Court of Appeals recognized that the Secretary's interpretation of the statute is entitled to deference, it rejected the regulations as contrary to clear congressional intent. The court remanded the case to the District Court with the direction that summary judgment be entered in favor of the plaintiff class on the claim that the Secretary must give child claimants an opportunity for individualized assessment of their functional limitations. *Id.*, at 77. We granted certiorari to resolve a conflict among the Circuits as to the validity of the Secretary's approach to child disability. 490 U. S. 1064 (1989).[5]

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[5] The First and Eleventh Circuits have upheld the validity of the Secretary's approach to child disability. *Hinckley ex rel. Martin* v. *Secretary of*

III

Since the Social Security Act expressly grants the Secretary rulemaking power, see n. 2, *supra*, "'our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious.'" *Yuckert*, 482 U. S., at 145 (quoting *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983)); see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). We conclude, however, that the Secretary's child-disability regulations cannot be reconciled with the statute they purport to implement.

The statute generally defines "disability" in terms of an individualized, functional inquiry into the effect of medical problems on a person's ability to work. *Yuckert*, 482 U. S., at 146 (Social Security Act adopts "functional approach"); *Campbell*, 461 U. S., at 459–460, 467 (Act "defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace"; "statutory scheme contemplates that disability hearings will be individualized determinations").

Health and Human Services, 742 F. 2d 19 (CA1 1984); *Powell ex rel. Powell* v. *Schweiker*, 688 F. 2d 1357 (CA11 1982). Also, the Fifth and Eighth Circuits have ruled that the Secretary properly applied the child-disability regulations to deny benefits in a particular case, without explicitly addressing the question whether the regulations are valid. *Nash ex rel. Alexander* v. *Bowen*, 882 F. 2d 1291 (CA8 1989); *Burnside ex rel. Burnside* v. *Bowen*, 845 F. 2d 587 (CA5 1988). The Third Circuit in the present case acknowledged the conflict. *Zebley ex rel. Zebley* v. *Bowen*, 855 F. 2d 67, 75 (1988).

The statutory standard for child disability is explicitly linked to this functional, individualized standard for adult disability. A child is considered to be disabled "if he suffers from any . . . impairment of comparable severity" to one that would render an adult "unable to engage in any substantial gainful activity." 42 U. S. C. § 1382c(a)(3)(A) (1982 ed.). The next paragraph of the statute elaborates on the adult disability standard, providing that an adult is considered unable to engage in substantial gainful activity, and is therefore disabled, if he is unable to do either his own past work or other work. § 1382c(a)(3)(B). In plain words, the two provisions together mean that a child is entitled to benefits if his impairment is as severe as one that would prevent an adult from working.

The question presented is whether the Secretary's method of determining child disability conforms to this statutory standard. Respondents argue, and the Third Circuit agreed, that it does not, because the regulatory requirement that a child claimant's impairment must match or be equivalent to a listed impairment denies benefits to those children whose impairments are severe and disabling even though the impairments are not listed and cannot meaningfully be compared with the listings. The Secretary concedes that his listings do not cover every impairment that could qualify a child for benefits under the statutory standard, but insists that the listings, together with the equivalence determination, see 20 CFR § 416.924(b)(3) (1989), are sufficient to carry out the statutory mandate that children with impairments of "comparable severity" shall be considered disabled. To decide this question, we must take a closer look at the regulations at issue.

IV

The listings set out at 20 CFR pt. 404, subpt. P, App. 1 (pt. A) (1989), are descriptions of various physical and mental illnesses and abnormalities, most of which are categorized by

the body system they affect.[6] Each impairment is defined in terms of several specific medical signs, symptoms, or laboratory test results.[7] For a claimant to show that his impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify.[8] See Social Security Ruling (SSR) 83–19,[9] Dept. of Health and Human Services Rulings 90 (Jan. 1983) ("An impairment 'meets' a listed condition . . . only when it manifests the specific findings described in the set of medical criteria for that listed impairment." "The level of severity in any particular

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[6] There are 125 impairments defined in the adult listings, and an additional 57 in the child listings. The body system categories in the adult listings are: musculoskeletal, special senses and speech, respiratory, cardiovascular, digestive, genitourinary, hemic and lymphatic, skin, and endocrine. In addition, there are four groups of listings not categorized by body system: multiple body system impairments, neurological impairments, mental disorders, and malignant neoplastic diseases. The child-disability listings include, in addition to all these, a category for growth impairment.

[7] For example, under the "growth impairment" category of the child-disability listings, 20 CFR pt. 404, subpt. P, App. 1 (pt. B), § 100.00 *et seq.* (1989), there is a listing the medical criteria of which require the claimant to show both a "[f]all of greater than 25 percentiles in height which is sustained" and "[b]one age greater than two standard deviations . . . below the mean for chronological age." § 100.03. Another example is the listing for "mental retardation," which requires that a child claimant show "[a]chievement of only those developmental milestones generally acquired by children no more than one-half the child's chronological age," or "IQ of 59 or less," or "IQ of 60–69, inclusive, and a physical or other mental impairment imposing additional and significant restriction of function or developmental progression." § 112.05.

[8] For example, in the growth impairment listing described in n. 7, *supra*, a child claimant whose "bone age" was slightly less than two standard deviations below normal would not qualify under the listing, even if his height was much more than 25 percentiles below normal.

[9] Social Security Rulings are agency rulings "published under the authority of the Commissioner of Social Security and are binding on all components of the Administration." 20 CFR § 422.408 (1989); see *Heckler* v. *Edwards*, 465 U. S. 870, 873, n. 3 (1984).

listing section is depicted by the *given set* of findings and not by the degree of severity of any single medical finding—no matter to what extent that finding may exceed the listed value"). *Id.*, at 91. (Emphasis in original.)

For a claimant to qualify for benefits by showing that his unlisted impairment, or combination of impairments, is "equivalent" to a listed impairment, he must present medical findings equal in severity to *all* the criteria for the one most similar listed impairment.[10] 20 CFR § 416.926(a) (1989) (a claimant's impairment is "equivalent" to a listed impairment "if the medical findings are at least equal in severity" to the medical criteria for "the listed impairment most like [the claimant's] impairment"); SSR 83–19, at 91 (a claimant's impairment is "equivalent" to a listing only if his symptoms, signs, and laboratory findings are "at least equivalent in severity to" the criteria for "the listed impairment most like the individual's impairment(s)"; when a person has a combination of impairments, "the medical findings of the combined impairments will be compared to the findings of the listed impairment most similar to the individual's most severe impairment").[11] A claimant cannot qualify for benefits under the "equivalence" step by showing that the overall functional impact of his unlisted impairment or combination of impairments is as severe as that of a listed impairment. SSR 83–19, at 91–92 ("[I]t is incorrect to consider whether the listing is equaled on the basis of an assessment of *overall* func-

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[10] For example, a child claimant with Down's syndrome (which currently is not a listed impairment), a congenital disorder usually manifested by mental retardation, skeletal deformity, and cardiovascular and digestive problems, would have to fulfill the criteria for whichever single listing his condition most resembled. See Brief for National Easter Seal Society et al. as *Amici Curiae* 17, n. 9.

[11] For example, if a child has both a growth impairment slightly less severe than required by listing § 100.03, and is mentally retarded but has an IQ just above the cut-off level set by § 112.04, he cannot qualify for benefits under the "equivalence" analysis—no matter how devastating the combined impact of mental retardation and impaired physical growth.

tional impairment. . . . The functional consequences of the impairments . . . irrespective of their nature or extent, *cannot* justify a determination of equivalence") (emphases in original).

The Secretary explicitly has set the medical criteria defining the listed impairments at a higher level of severity than the statutory standard. The listings define impairments that would prevent an adult, regardless of his age, education, or work experience, from performing *any* gainful activity, not just "substantial gainful activity." See 20 CFR § 416.925(a) (1989) (purpose of listings is to describe impairments "severe enough to prevent a person from doing any gainful activity"); SSR 83–19, at 90 (listings define "medical conditions which ordinarily prevent an individual from engaging in any gainful activity"). The reason for this difference between the listings' level of severity and the statutory standard is that, for adults, the listings were designed to operate as a presumption of disability that makes further inquiry unnecessary. That is, if an adult is not actually working and his impairment matches or is equivalent to a listed impairment, he is presumed unable to work and is awarded benefits without a determination whether he actually can perform his own prior work or other work. See *Yuckert*, 482 U. S., at 141 (if an adult's impairment "meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one that is conclusively presumed to be disabling, the evaluation proceeds to the fourth step"); *id.*, at 153 (the listings "streamlin[e] the decision process by identifying those claimants whose medical impairments are so severe that it is likely they would be found disabled regardless of their vocational background"); *Bowen* v. *City of New York*, 476 U. S. 467, 471 (1986) ("If a claimant's condition meets or equals the listed impairments, he is conclusively presumed to be disabled and entitled to benefits"; if not, "the process moves to the fourth step"); *Campbell*, 461 U. S., at 460 ("The regulations recognize that

certain impairments are so severe that they prevent a person from pursuing any gainful work. . . . A claimant who establishes that he suffers from one of these impairments will be considered disabled without further inquiry. . . . If a claimant suffers from a less severe impairment, the Secretary must determine whether the claimant retains the ability to [work]").

When the Secretary developed the child-disability listings, he set their medical criteria at the same level of severity as that of the adult listings. See 42 Fed. Reg. 14705 (1977) (the child-disability listings describe impairments "of 'comparable severity' to the adult listing"); SSA Disability Insurance Letter[12] No. III–11 (Jan. 9, 1974), App. 97 (child-disability listings describe impairments that affect children "to the same extent as . . . the impairments listed in the adult criteria" affect adults' ability to work).

Thus, the listings in several ways are more restrictive than the statutory standard. First, the listings obviously do not cover all illnesses and abnormalities that actually can be disabling. The Secretary himself has characterized the adult listing as merely containing "over 100 *examples* of medical conditions which ordinarily prevent" a person from working, and has recognized that "it is difficult to include in the listing all the sets of medical findings which describe impairments severe enough to prevent any gainful work." SSR 83–19, at 90 (emphasis added). See also 50 Fed. Reg. 50068, 50069 (1985) (listings contain only the most "frequently diagnosed" impairments); 44 Fed. Reg. 18170, 18175 (1979) ("The Listing criteria are intended to identify the more commonly occurring impairments"). Similarly, when the Secretary published the child-disability listings for comment in 1977, he described them as including only the "more common impairments" affecting children. 42 Fed. Reg. 14706 (the child-

[12] A Disability Insurance Letter (DIL) is an internal directive sent by the Secretary to the state agencies responsible for disability determinations. See Brief for Petitioner 36.

disability listings "provide a means to efficiently and equitably evaluate the more common impairments").[13]

Second, even those medical conditions that are covered in the listings are defined by criteria setting a higher level of severity than the statutory standard, so they exclude claimants who have listed impairments in a form severe enough to preclude *substantial* gainful activity, but not quite severe enough to meet the listings level—that which would preclude *any* gainful activity. Third, the listings also exclude any claimant whose impairment would not prevent any and all persons from doing any kind of work, but which actually precludes the particular claimant from working, given its actual effects on him—such as pain, consequences of medication, and other symptoms that vary greatly with the individual[14]—and given the claimant's age, education, and work experience. Fourth, the equivalence analysis excludes claimants who have unlisted impairments, or combinations of impairments, that do not fulfill all the criteria for any one listed impairment. Thus, there are several obvious categories of claimants who would not qualify under the listings, but who nonetheless would meet the statutory standard.

For *adults*, these shortcomings of the listings are remedied at the final, vocational steps of the Secretary's test. A

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[13] There are, as yet, no specific listings for many well-known childhood impairments, including spina bifida, Down's syndrome, muscular dystrophy, autism, AIDS, infant drug dependency, and fetal alcohol syndrome. See Brief for American Medical Association et al. as *Amici Curiae* (AMA Brief) 22. The Secretary, however, has proposed new listings for "Down syndrome and other Hereditary, Congenital, and Acquired Disorders." 52 Fed. Reg. 37161 (1987). See Reply Brief for Petitioner 19, n. 16.

[14] The Secretary has stated that the severity of perceived symptoms such as pain has no bearing on the determination whether a claimant's impairment meets or equals a listing. SSR 82–58, Dept. of Health and Human Services Rulings 121 (cum. ed. 1982) ("No alleged or reported intensity of the symptoms can be substituted to elevate impairment severity to equivalency. . . . [C]omplaints of 'severe,' 'extreme,' or 'constant' pain will not compensate for . . . missing medical findings and permit an 'equals' determination") (emphasis deleted).

claimant who does not qualify for benefits under the listings, for any of the reasons described above, still has the opportunity to show that his impairment in fact prevents him from working. 20 CFR §§ 416.920(e) and (f) (1989); *Yuckert*, 482 U. S., at 141 (if an adult claimant's "impairment is not one that is conclusively presumed to be disabling, the evaluation proceeds" to the fourth and fifth steps); *Campbell*, 461 U. S., at 460 ("If a claimant suffers from a less severe impairment" than the listed impairments, "the Secretary must determine whether the claimant retains the ability to perform either his former work or some less demanding employment").[15]

For children, however, there is no similar opportunity. Children whose impairments are not quite severe enough to rise to the presumptively disabling level set by the listings; children with impairments that might not disable any and all children, but which actually disable *them*, due to symptomatic effects such as pain, nausea, side effects of medication, etc., or due to their particular age, educational background, and circumstances; and children with unlisted impairments or combinations of impairments[16] that are not equivalent to any one listing—all these categories of child claimants are simply

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[15] About 25% of adult claimants qualify for benefits under steps 4 and 5 of the Secretary's test. House Committee on Ways and Means, Background Material and Data On Programs Within the Jurisdiction of the Committee on Ways and Means, 101st Cong., 1st Sess., 46 (Comm. Print 1989).

[16] As the dissent points out, *post*, at 546–547, 42 U. S. C. § 1382c(a)(3)(F) (1982 ed., Supp. V) requires that "the combined impact of [multiple] impairments shall be considered throughout the disability determination process," and 20 CFR § 416.923 (1989) promises that "we will consider the combined effect of all your impairments." This assurance may be of value to adult claimants, but not to children, for whom the combined effect of multiple impairments is considered *only* within the confines of the equivalence determination, "whether the combination of your impairments is medically equal to *any listed impairment*." § 416.926(a). As the Court of Appeals noted, *if* children are afforded the individualized consideration given to adults, *then* § 416.923 would fulfill the statutory mandate as to children with multiple impairments. 855 F. 2d, at 76.

denied benefits, even if their impairments are of "comparable severity" to ones that would actually (though not presumptively) render an adult disabled.[17]

The child-disability regulations are simply inconsistent with the statutory standard of "comparable severity."[18] This in-

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[17] Empirical evidence suggests that the rigidity of the Secretary's listings-only approach has a severe impact on child claimants. There are many rare childhood diseases that cannot meaningfully be compared with any of the listings. AMA Brief 6, 25 (it is unlikely "that any physician could make meaningful comparisons between extremely rare diseases and the set medical criteria listed by the Secretary"). Moreover, the listings-only approach disregards factors such as pain, side effects of medication, feeding problems, dependence on medical equipment, confinement at home, and frequent hospitalization, that vary with each individual case. A recent study prepared for the Department of Health and Human Services suggests that children with multiple impairments, young children who cannot be subjected to the clinical tests required by the listings criteria, and children whose impairments have a severe functional impact but which do not match listings criteria are often denied benefits. H. Fox & A. Greaney, Disabled Children's Access to Supplemental Security Income and Medicaid Benefits (1988).

A telling example of the effect of the listings-only approach is found in *Wilkinson ex rel. Wilkinson* v. *Bowen*, 847 F. 2d 660 (CA11 1987) (child with rare liver disorder causing severe swelling, food allergies, and fever, and requiring constant care and confinement at home, does not qualify for benefits because his impairment does not meet or equal the criteria for any listing); see also *Zebley ex rel. Zebley* v. *Bowen*, 855 F. 2d 67 (CA3 1988) (plaintiff Zebley denied benefits, despite evidence of congenital brain damage, mental retardation, development delay, eye problems, and musculoskeletal impairment, because his condition did not meet or equal any listing).

The disparity in the Secretary's treatment of child and adult claimants is thrown into sharp relief in cases where an unsuccessful child claimant, upon reaching age 18, is awarded benefits on the basis of the *same* impairment deemed insufficient to qualify him for child disability benefits. See, *e. g.*, *Wills* v. *Secretary of Health and Human Services*, 686 F. Supp. 171, 172, and n. 1 (WD Mich. 1987); App. to Brief for National Organization of Social Security Claimants' Representatives as *Amicus Curiae* A–3 to A–24 (Administrative Law Judge decisions awarding benefits when child claimant turns 18). See also Tr. of Oral Arg. 13–14.

[18] The dissent proposes that children who fail to qualify for benefits under the Secretary's current approach can simply "make their case before

consistency is aptly illustrated by the fact that the Secretary applies the same approach to child-disability determinations under Title XVI and to widows' and widowers' disability benefits under Title II, despite the fact that Title II sets a stricter standard for widows' benefits. Under the Secretary's regulations and rulings, both widows and children qualify for benefits *only* if the medical evidence of their impairments meets or equals a listing. SSR 83–19, at 93. Title II provides: "A widow . . . [or] widower shall not be determined to be under a disability . . . unless his or her . . . impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U. S. C. § 423(d)(2)(B) (1982 ed., Supp. V). When Congress set out to provide disabled children with benefits, it chose to link the disability standard *not* to this test, but instead to the more liberal test set forth in § 423(d)(2)(A) and in § 1382c(a)(3)(A) (any impairment making a claimant "unable to engage in any substantial gainful activity" qualifies him for benefits). The Secretary's regulations, treating child-disability claims like claims for widows' benefits, nullify this congressional choice. See *Yuckert*, 482 U. S., at 163–164 (dissenting opinion) (contrasting widows' disability statute with the § 423(d)(2)(A)/§ 1382c(a)(3) test, which requires an individualized inquiry as to whether the claimant can work); S. Rep. No. 744, 90th Cong., 1st Sess., 49 (1967) (disabled widows' statutory "test of disability . . . is somewhat more restrictive than that for disabled workers").[19]

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the Secretary, and take the case to court if their claims are rejected." *Post*, at 545. We fail to see why each child denied benefits because his impairment falls within the several categories of impairments that meet the statutory standard but do not qualify under the Secretary's listings-only approach should be compelled to raise a separate, as-applied challenge to the regulations, or why a facial challenge is not a proper response to the systemic disparity between the statutory standard and the Secretary's approach to child-disability claims.

[19] The dissent, *post*, at 547, n. 2, appears to accept the Secretary's argument that Congress expressly indicated its approval of his approach to

V

The Secretary does not seriously dispute the disparity in his approach to child- and adult-disability determinations.

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child disability in 1976, when it directed him to "publish criteria" to be employed to determine disability in children's cases. Unemployment Compensation Amendments of 1976, § 501(b), 90 Stat. 2685. At that time, however, Congress could not have known the exact contours of the Secretary's approach. Congress had before it only the Secretary's 1973 and 1974 DIL's and accompanying "medical guides" that eventually became the child-disability listings, and the proposed regulations published for comment at 39 Fed. Reg. 1624 (1974).

The DIL's are ambiguous as to the scope of the child-disability determination. The 1973 DIL says that "childhood disability will be determined solely in consideration of medical factors," but it also says that "disability in children must be defined in terms of the primary activity in which they engage, namely growth and development," and that "[d]escriptions of a child's activities, behavioral adjustment, and school achievement may be considered in relationship to the overall medical history regarding severity of the impairment." DIL No. III–11 (1973), App. 90–91. The 1974 DIL does reflect the listings-only approach, but its discussion of the "equivalence" determination suggests a broader inquiry than the Secretary's present rules allow. DIL No. III–11, Supp. 1 (1974), App. 97 ("'[M]edical equivalency' concept . . . takes into account the particular effect of disease processes in childhood"; when used to evaluate multiple impairments, "[e]ach impairment must have some substantial adverse effect on the child's major daily activities, and together must 'equal' the specified impact"). Congress could not have guessed that these early directives would evolve into the present regulatory scheme.

Similarly, the 1974 proposed regulations provide that a child with an unlisted impairment qualifies for benefits if his impairment is "determined . . . with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment." 39 Fed. Reg., at 1626. The regulation defining "medical equivalence" says only that an impairment is equivalent to a listed one "only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment." *Ibid.*; cf. 20 CFR § 416.926 (1989) (current definition of "equivalence," requiring claimant to meet all criteria for the one most similar listed impairment). Thus, the proposed regulations gave little warning of the Secretary's current, strictly limited equivalence analysis. At least until SSR 83–19 was promulgated in 1983, it did not become clear that the listings criteria would be applied so

He argues, instead, that the listings-only approach is the only practicable way to determine whether a child's impairment is "comparable" to one that would disable an adult. An individualized, functional approach to child-disability claims like that provided for adults is not feasible, the Secretary asserts, since children do not work; there is no available measure of their functional abilities analogous to an adult's ability to work, so the only way to measure "comparable severity" is to compare child claimants' medical evidence with the standard of severity set by the listings. Laying to one side the obvious point that such a comparison does not properly implement the statute because the Secretary's current listings set a level of severity higher than that prescribed by the statute, this argument still is not persuasive. Even if the listings were set at the same level of severity as the statute, and expanded to cover many more childhood impairments, *no* set of listings could ensure that child claimants would receive benefits whenever their impairments are of "comparable severity" to ones that would qualify an adult for benefits under the individualized, functional analysis contemplated by the statute and provided to adults by the Secretary. No decision process restricted to comparing claimants' medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof, the varying impact of such conditions due to the claimant's individual characteristics, and the constant evolution of medical diagnostic techniques.

The Secretary's claim that a functional analysis of child-disability claims is not feasible is unconvincing. The fact that a *vocational* analysis is inapplicable to children does not

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rigidly, and that proof of equivalence would require a strict matching of the criteria for the single most similar listed impairment.

The 1976 directive to publish criteria therefore has little bearing on the question whether the Secretary's present approach to child disability is consistent with the statute.

mean that a *functional* analysis cannot be applied to them. An inquiry into the impact of an impairment on the normal daily activities of a child of the claimant's age—speaking, walking, washing, dressing, feeding oneself, going to school, playing, etc.—is, in our view, no more amorphous or unmanageable than an inquiry into the impact of an adult's impairment on his ability to perform "any other kind of substantial gainful work which exists in the national economy," § 1382c(a)(3)(B).[20] Moreover, the Secretary tacitly acknowledges that functional assessment of child claimants is possible, in that some of his own listings are defined in terms of functional criteria. See, *e. g.*, 20 CFR pt. 404, subpt. P, App. 1 (pt. B), § 101.03 (1989) (listing for "Deficit of musculoskeletal function" defined in terms of difficulty in walking or "[i]nability to perform age-related personal self-care activities involving feeding, dressing, and personal hygiene"); § 111.02(B) (listing for "Major motor seizures" defined in terms of "Significant interference with communication" or "Significant emotional disorder," or "Where significant adverse effects of medication interfere with major daily activities"); § 112.05(C) (mental retardation listing for claimants with IQ of 60–69 requiring "a physical or other mental impairment imposing additional and significant restriction of function or developmental progression").[21] Also, the Secretary's

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[20] The Secretary's own regulations state that this inquiry involves assessment of an adult claimant's ability to "do physical activities such as walking, standing, lifting, carrying, pushing, pulling, reaching, handling," and his ability "to carry out and remember instructions, and to respond appropriately to supervision, co-workers and work pressures in a work setting." 20 CFR §§ 416.945(b) and (c) (1989). It is difficult to see why such functional assessment would be feasible for adults and not for children.

[21] The Secretary contends that, because some of the child-disability listings include functional criteria, his approach to child disability adequately takes account of functional considerations. Brief for Petitioner 42. This argument is unavailing. The fact that some of the listed impairments are defined in terms of functional criteria is small comfort to child claimants

own test for cessation of disability involves an examination of a child claimant's ability to "perform age-appropriate activities." 20 CFR § 416.994(c) (1989). Finally, the Secretary's insistence that child claimants must be assessed from "a medical perspective alone, without individualized consideration of . . . residual functional capacity," Brief for Petitioner 45, seems to us to make little sense in light of the fact that standard medical diagnostic techniques often include assessment of the functional impact of the disorder.[22]

VI

We conclude that the Secretary's regulations and rulings implementing the child-disability statute simply do not carry out the statutory requirement that SSI benefits shall be provided to children with "any . . . impairment of comparable severity" to an impairment that would make an adult "unable to engage in any substantial gainful activity." § 1382c(a)(3)(A). For that reason, the Secretary's approach to child disability is "manifestly contrary to the statute," *Chevron*, 467 U. S., at 844, and exceeds his statutory authority.

The judgment of the Court of Appeals, vacating in part the District Court's grant of summary judgment in the Secretary's favor as to the claims of the plaintiff class, is affirmed.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

Only two Terms ago, when reviewing an aspect of the Secretary's methodology for evaluating disability applications

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who do not have one of those impairments and who fail to qualify for benefits for one of the reasons discussed above.

[22] See AMA Brief 5 ("The view that proper study or treatment of pediatric illness and injury must include an assessment of the child's functional capacity to perform age-appropriate activities is well accepted in the medical community. . . . The biological severity of an illness is an abstraction, measured only by proxies, the most familiar of which are physiological severity, functional severity and burden of illness").

under this Act, we emphasized that "Congress has 'conferred on the Secretary exceptionally broad authority'" in this context, and we stated that the Secretary's regulations were therefore entitled to great deference. *Bowen* v. *Yuckert*, 482 U. S. 137, 145 (1987), quoting *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983). Because the majority has failed to abide by this principle, I respectfully dissent.

As this case involves a challenge to an agency's interpretation of a statute that the agency was entrusted to administer, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), provides the framework for our review. We should therefore first ask whether Congress has expressed a clear intent on the question at issue here; if so, we should enforce that intent. If not, as I think is the case, we should defer to the agency's interpretation as long as it is permissible. *Id.*, at 842–845.

Section 1614(a)(3)(A) of the Social Security Act, 42 U. S. C. § 1382c(a)(3)(A) (1982 ed.), provides that a person is disabled if he is unable by reason of any medically determinable physical or mental impairment to engage in any substantial gainful employment; subsection (3)(B) further defines "disability" by providing that the impairment or impairments must be severe enough, considering the person's age, education, and work experience, to prevent him from engaging in any kind of substantial gainful employment which exists in the national economy. The Secretary has implemented the statute with respect to adults by regulations listing certain impairments that he will, without more, consider disabling because each of them would prevent an adult from engaging in any kind of gainful employment. 20 CFR pt. 404, subpt. P, App. 1 (1989). If not suffering from one of those impairments or its equivalent, an adult is then given further consideration as required by subsection (a)(3)(B) in order to determine whether in light of his impairment and the specified nonmedical factors he could perform any substantial gainful activities in the national labor market.

At the end of 42 U. S. C. § 1382c(a)(3)(A) (1982 ed.), with its definition of disability, is a parenthetical provision defining that term in the case of persons under 18: "or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity." There is no reference to nonmedical factors in this definition and no references to specific consequences that an impairment must or should produce. Furthermore, neither "comparable," "severity," nor the two words together are there or elsewhere defined in the Act, and their meaning is anything but clear. The severity of an impairment that disables an adult is measured by its effects on the ability to engage in gainful employment. But that yardstick is not useful with respect to children, whose inability to work is not due to mental or physical impairment, but to the stage of their development and the labor market. Given this task of comparing apples and oranges, it is understandable that the Secretary implemented the statute with respect to children in a somewhat different manner than he did for adults, and surely there is no direction in the statute to employ the same methodology for both groups.

Under the regulations applying to children, a person under 18 will be considered disabled if suffering from a Part A impairment listed for adults or its equivalent, as long as the disease's processes have a similar effect on adults and younger persons. Because vocational considerations are largely beside the point in dealing with children—a fact that the Secretary submits Congress recognized in referring only to medical considerations in subsection (a)(3)(A)'s definition of what would disable a child—the regulations do not provide for further consideration of the child in light of such factors. Instead, a child not suffering from a Part A impairment is evaluated under an additional listing of impairments in Part B of Appendix 1 to subpart P, any of which, or its equivalent, will be deemed sufficient to disable a child. The preamble to Part B, published in 1977, 42 Fed. Reg. 14705, stated that in

identifying medical criteria that would establish disability for a child, the Secretary had placed primary emphasis on the effects of physical and mental impairments in children, and the restrictions on growth, learning, and development imposed on the child by the impairments. The impairments that were determined to affect the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of "comparable severity" to the disabling adult impairments.

I do not find this approach to be an impermissible implementation of the rather ambiguous congressional directives with respect to children. Surely it cannot be said that the regulations, insofar as they use the Part A and Part B listings, singly or in combination, to identify disability in children, are inconsistent with the statute and void on their face. And as I understand it, no one claims that they are. What is submitted is, first, that the listings do not identify all of the specific medical impairments that should be considered disabling, and second, that each child not deemed disabled under Parts A and B must be evaluated in terms of both his or her medical impairments and nonmedical factors, as are adults.

These alleged deficiencies are said to be sufficient to invalidate the regulations on their face. But surely these claims, if true, only would demonstrate that the regulations do not go far enough. Furthermore, the claims purport to be supported by descriptions of various unlisted impairments and anecdotal evidence, none of which, it seems to me, has been adjudged by a court to be sufficient to demonstrate that the Part B impairments, or their equivalents, fail to identify impairments that will have comparably severe effects on a child's development as the disabling impairments for an adult will have on an adult's ability to engage in substantial gainful employment. If there are medically determinable diseases or impairments that should be considered disabling because of comparable severity to those affecting adults, the children

suffering from them should claim disability, make their case before the Secretary, and take the case to court if their claims are rejected.[1] As for the more general attack on the regulation—that they do not provide for individualized evaluation based on nonmedical factors—the Secretary contends that it is a reasonable construction of section 3(A) to confine disabling criteria to medical factors where children are concerned. In any event, rather than declaring the regulations wholly or partly void on their face, the Court would be better advised to insist on children making out their claims in individual cases; only then can a court confidently say that the medically identifiable impairment, though neither a listed impairment nor its equivalent, is nevertheless of "comparable severity" and hence disabling when considered with nonmedical factors.

I thus largely agree with District Judge Fullam's view of this case:

> "Plaintiff's argument may well be valid, in many cases; but errors in applying the regulations in some cases do not demonstrate invalidity of the regulations themselves. Part B of the Secretary's listings of impairments, 20 CFR § 416.925, is not facially invalid or incom-

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[1] The majority suggests that the agency has conceded that its listing approach is not intended to satisfy the statutory standard of "comparable severity" because the Secretary only designed the lists to compensate claimants who suffer from disabilities that prevent any gainful activity, rather than claimants who suffer from disabilities that prevent any substantial gainful activity. It is difficult, however, particularly in light of the agency's interpretation of its own regulations, to extract from them an admission on the agency's part that it has failed to fulfill its statutory responsibilities. The regulations specifically state both that "[t]he law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment . . ." and that "[i]f you are under age 18, we will consider you disabled if you are suffering from any medically determinable physical or mental impairment which compares in severity to an impairment that would make an adult (a person over 18) disabled." 20 CFR §§ 416.905, 416.906 (1989).

plete, seems to provide the necessary flexibility, and, in my view, permits the award of benefits in conformity with the intent of Congress. If these criteria are being misapplied or misinterpreted, the remedy lies in the appeal process in individual cases, not in a class-action decree." *Zebley* v. *Heckler*, 642 F. Supp. 220, 222 (ED Pa. 1986).

The difference, furthermore, between the Secretary's regulatory approach toward adults and his approach toward children accords with the different purposes underlying the disability programs for the two groups. Congress provided disability benefits for adults in order to ensure "the basic means of replacing earnings that have been lost as a result of . . . disability" for those who "are not able to support themselves through work . . . ." H. R. Rep. No. 92–231, pp. 146–147 (1971). For this reason, insofar as adults are concerned, the Act defines disabilities in terms of the effect that the disabilities have on the claimant's ability to function in the workplace. In light of this purpose, it is appropriate for the Secretary to evaluate adults not only in terms of the severity of their impairment, but also in terms of their residual functional capacity to perform work.

By contrast, Congress had a different set of considerations in mind when it provided for children's benefits. Recognizing that disabled children from low-income households are "among the most disadvantaged of all Americans," Congress provided special disability benefits for these persons "because their needs are often greater than those of nondisabled children." H. R. Rep. No. 92–231, *supra*, at 147–148. In other words, Congress' aim in providing benefits to these individuals was not to replace lost income, but rather to provide for their special health care expenses, such as the home health care costs arising out of the child's medical disability. It is consistent with this quite distinct purpose to focus consideration on the severity of the child's impairment from a medical perspective alone, without individualized consider-

ation of vocational or similar factors or the claimant's residual functional capacity. The nature and severity of a child's impairment, rather than the child's ability to contribute to his family's income, will necessarily determine the child's entitlement to benefits.[2]

I also note that the majority faults the regulations on the grounds that they do not adequately provide for considering multiple impairments together. *Ante*, at 534. As 42 U. S. C. § 1382c(a)(3)(F) (1982 ed., Supp. IV) requires, however, the regulations expressly provide that impairments in combination may add up to qualify for benefits. 20 CFR § 416.923 (1989). The Court of Appeals recognized that the Secretary's regulations faithfully implement the statutory mandate "by providing generally that the combined effect of all of a claimant's impairments will be considered throughout the disability determination process." *Zebley* v. *Bowen*, 855 F. 2d 67, 76 (CA3 1988). There is no cross-petition challenging this aspect of the judgment below, and the Court should therefore not expand the relief obtained in the Court of Appeals.

In sum, because I cannot conclude that the Secretary's method for evaluating child-disability claims is an impermis-

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[2] Congress' acquiescence in the Secretary's regulatory technique for assessing child-disability applications supports the position that the Secretary's approach is reasonable. In 1976, Congress directed the Secretary to publish his criteria for evaluating disability payments for children. Unemployment Compensation Amendments of 1976, § 501(b), 90 Stat. 2685. Despite the majority's contention to the contrary, the history of this legislation indicates that Congress understood and, at least implicitly, condoned the Secretary's methodology for evaluating child-disability claims. The Senate Report states:

"The regulations which have been issued with regard to disability for children state that if a child's impairments are not those listed, eligibility may still be met if the impairments 'singly or in combination . . . are determined by the Social Security Administration, with appropriate consideration of the particular effect of the disease processes in childhood, to be medically the equivalent of a listed impairment.'" S. Rep. No. 94–1265, p. 24 (1976).

sible construction of the Act, I dissent. The Social Security Administration processes over 100,000 child-disability claims a year. The agency has a finite amount of funds with which to work. By requiring the Secretary to conduct unspecified individualized determinations in cases where an applicant fails to satisfy the agency that he is otherwise disabled, the majority imposes costs on the agency that surely will detract from the pool of benefits available to the unfortunate children that Congress has sought to protect through the Supplemental Security Income Program.

Syllabus

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* BOUKNIGHT

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 88–1182. Argued November 7, 1989—Decided February 20, 1990*

Based on evidence that respondent Bouknight had abused petitioner Maurice M., her infant son, petitioner Baltimore City Department of Social Services (BCDSS) secured a juvenile court order removing Maurice from Bouknight's control. That order was subsequently modified to return custody to Bouknight pursuant to extensive conditions and subject to further court order. After Bouknight violated the order's conditions, the court granted BCDSS' petition to remove Maurice from her control and held her in civil contempt when she failed to produce the child as ordered. Rejecting her subsequent claim that the contempt order violated the Fifth Amendment's guarantee against self-incrimination, the court stated that the contempt would be purged by the production of Maurice and was issued not because Bouknight refused to testify but because she failed to obey the production order. In vacating the juvenile court's judgment upholding the contempt order, the State Court of Appeals found that that order unconstitutionally compelled Bouknight to admit through the act of production a measure of continuing control over Maurice in circumstances in which she had a reasonable apprehension that she would be prosecuted.

Held: A mother who is the custodian of her child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child. Pp. 554–562.

(a) Although the privilege applies only when an accused is compelled to make an incriminating testimonial communication, the fact that Bouknight could comply with the order through the unadorned act of producing Maurice does not necessarily deprive her of the privilege, because the act of complying may testify to the existence, possession, or authenticity of the thing produced. See, *e. g.*, *United States* v. *Doe*, 465 U. S. 605. Pp. 554–555.

(b) Even assuming that the act of production would amount to a communication regarding Bouknight's control over, and possession of, Maurice that is sufficiently incriminating and testimonial in character, she may not invoke the privilege to resist the production order in the present

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*Together with No. 88–6651, *Maurice M.* v. *Bouknight*, also on certiorari to the same court.

circumstances. The ability to invoke the privilege is greatly diminished when invocation would interfere with the effective operation of a generally applicable regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws, see, *e. g.*, *California* v. *Byers*, 402 U. S. 424, 430, and when a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, cf. *Shapiro* v. *United States*, 335 U. S. 1. Here, Maurice's care and safety became the particular object of the State's regulatory interest once the juvenile court adjudicated him a child in need of assistance. Moreover, by taking responsibility for such care subject to the custodial order's conditions, Bouknight submitted to the regulatory system's routine operation, agreed to hold Maurice in a manner consonant with the State's interests, and accepted the incident obligation to permit inspection. Furthermore, the State imposes that obligation as part of a broadly directly, noncriminal regulatory regime governing children cared for pursuant to custodial orders. Persons who care for such children are not a selective group inherently suspect of criminal activities. Similarly, the efforts of BCDSS and the judiciary to gain access to the children focus primarily on the children's well-being rather than on criminal conduct, and are enforced through measures unrelated to criminal law enforcement. Finally, production in the vast majority of cases will embody no incriminating testimony. Pp. 555–561.

(c) The custodial role that limits Bouknight's ability to resist the production order may give rise to corresponding limitations upon the State's ability to use the testimonial aspects of her act of production directly or indirectly in any subsequent criminal proceedings. See, *e. g.*, *Braswell* v. *United States*, 487 U. S. 99, 118, and n. 11. Pp. 561–562.

314 Md. 391, 550 A. 2d 1135, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 563.

Ralph S. Tyler III argued the cause for petitioner in No. 88–1182. With him on the briefs were *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Andrew H. Baida* and *Carmen M. Shepard*, Assistant Attorneys General. *Mitchell Y. Mirviss* argued the cause for petitioner in No. 88–6651. With him on the briefs were *Susan Dishler Shubin*, *Stuart R. Cohen*, *Kathi Grasso*, and *M. Gayle Hafner*.

George E. Burns, Jr., argued the cause for respondent. With him on the brief were *Jose F. Anderson*, *George M. Lipman*, *Gary S. Offutt*, *Robin Parsons*, and *M. Christina Gutierrez*.†

JUSTICE O'CONNOR delivered the opinion of the Court.

In this action, we must decide whether a mother, the custodian of a child pursuant to a court order, may invoke the Fifth Amendment privilege against self-incrimination to resist an order of the juvenile court to produce the child. We hold that she may not.

I

Petitioner Maurice M. is an abused child. When he was three months old, he was hospitalized with a fractured left femur, and examination revealed several partially healed bone fractures and other indications of severe physical abuse. In the hospital, respondent Bouknight, Maurice's mother,

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†Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, *Judy G. Zeprun*, *Judith Fabricant*, and *Countess C. Williams*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Douglas B. Baily* of Alaska, *Robert A. Corbin* of Arizona, *John K. Van de Kamp* of California, *John J. Kelly* of Connecticut, *Charles M. Oberly III* of Delaware, *Neil F. Hartigan* of Illinois, *Gordon Allen* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Brian McKay* of Nevada, *Jeffrey Howard* of New Hampshire, *Peter N. Perretti, Jr.*, of New Jersey, *Hal Stratton* of New Mexico, *Nicholas Spaeth* of North Dakota, *Dave Frohnmayer* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Charlie Brown* of West Virginia, and *Joseph B. Meyer* of Wyoming; for Advocates for Children and Youth Inc. by *Cheri Wyron Levin;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Juvenile Protective Association by *Thomas H. Morsch;* and for the U. S. Conference of Mayors et al. by *Benna Ruth Solomon*, *Melvin Spaeth*, and *Donald O. Beers*.

William L. Grimm filed a brief for Charles M. as *amicus curiae*.

was observed shaking Maurice, dropping him in his crib despite his spica cast, and otherwise handling him in a manner inconsistent with his recovery and continued health. Hospital personnel notified the Baltimore City Department of Social Services (BCDSS), petitioner in No. 88–1182, of suspected child abuse. In February 1987, BCDSS secured a court order removing Maurice from Bouknight's control and placing him in shelter care. Several months later, the shelter care order was inexplicably modified to return Maurice to Bouknight's custody temporarily. Following a hearing held shortly thereafter, the juvenile court declared Maurice to be a "child in need of assistance," thus asserting jurisdiction over Maurice and placing him under BCDSS' continuing oversight. BCDSS agreed that Bouknight could continue as custodian of the child, but only pursuant to extensive conditions set forth in a court-approved protective supervision order. The order required Bouknight to "cooperate with BCDSS," "continue in therapy," participate in parental aid and training programs, and "refrain from physically punishing [Maurice]." App. to Pet. for Cert. 86a. The order's terms were "all subject to the further Order of the Court." *Id.*, at 87a. Bouknight's attorney signed the order, and Bouknight in a separate form set forth her agreement to each term.

Eight months later, fearing for Maurice's safety, BCDSS returned to juvenile court. BCDSS caseworkers related that Bouknight would not cooperate with them and had in nearly every respect violated the terms of the protective order. BCDSS stated that Maurice's father had recently died in a shooting incident and that Bouknight, in light of the results of a psychological examination and her history of drug use, could not provide adequate care for the child. App. 33–34. On April 20, 1988, the court granted BCDSS' petition to remove Maurice from Bouknight's control for placement in foster care. BCDSS officials also petitioned for judicial relief from Bouknight's failure to produce Maurice or reveal where he could be found. *Id.*, at 36–39. The petition

recounted that on two recent visits by BCDSS officials to Bouknight's home, she had refused to reveal the location of the child or had indicated that the child was with an aunt whom she would not identify. The petition further asserted that inquiries of Bouknight's known relatives had revealed that none of them had recently seen Maurice and that BCDSS had prompted the police to issue a missing persons report and referred the case for investigation by the police homicide division. Also on April 20, the juvenile court, upon a hearing on the petition, cited Bouknight for violating the protective custody order and for failing to appear at the hearing. Bouknight had indicated to her attorney that she would appear with the child, but also expressed fear that if she appeared the State would "'snatch the child.'" *Id.*, at 42, 54. The court issued an order to show cause why Bouknight should not be held in civil contempt for failure to produce the child. Expressing concern that Maurice was endangered or perhaps dead, the court issued a bench warrant for Bouknight's appearance. *Id.*, at 51–57.

Maurice was not produced at subsequent hearings. At a hearing one week later, Bouknight claimed that Maurice was with a relative in Dallas. Investigation revealed that the relative had not seen Maurice. The next day, following another hearing at which Bouknight again declined to produce Maurice, the juvenile court found Bouknight in contempt for failure to produce the child as ordered. There was and has been no indication that she was unable to comply with the order. The court directed that Bouknight be imprisoned until she "purge[d] herself of contempt by either producing [Maurice] before the court or revealing to the court his exact whereabouts." App. to Pet. for Cert. 82a.

The juvenile court rejected Bouknight's subsequent claim that the contempt order violated the Fifth Amendment's guarantee against self-incrimination. The court stated that the production of Maurice would purge the contempt and that "[t]he contempt is issued not because she refuse[d] to

testify in any proceeding . . . [but] because she has failed to abide by the Order of this Court, mainly [for] the production of Maurice M." App. 150. While that decision was being appealed, Bouknight was convicted of theft and sentenced to 18 months' imprisonment in separate proceedings. The Court of Appeals of Maryland vacated the juvenile court's judgment upholding the contempt order. *In re Maurice M.*, 314 Md. 391, 550 A. 2d 1135 (1988). The Court of Appeals found that the contempt order unconstitutionally compelled Bouknight to admit through the act of production "a measure of continuing control and dominion over Maurice's person" in circumstances in which "Bouknight has a reasonable apprehension that she will be prosecuted." *Id.*, at 403–404, 550 A. 2d, at 1141. CHIEF JUSTICE REHNQUIST granted BCDSS' application for a stay of the judgment and mandate of the Maryland Court of Appeals, pending disposition of the petition for a writ of certiorari. 488 U. S. 1301 (1988) (in chambers). We granted certiorari, 490 U. S. 1003 (1989), and we now reverse.

II

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment's protection "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher* v. *United States*, 425 U. S. 391, 408 (1976); see *Doe* v. *United States*, 487 U. S. 201, 207, 209–210, n. 8 (1988) *(Doe II); Schmerber* v. *California*, 384 U. S. 757, 761 (1966) ("[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature"). The juvenile court concluded that Bouknight could comply with the order through the unadorned act of producing the child, and we thus address that aspect of the order. When the government demands that an item be produced, "the only thing compelled is the act of pro-

ducing the [item]." *Fisher*, *supra*, at 410, n. 11; see *United States* v. *Doe*, 465 U. S. 605, 612 (1984) *(Doe I)*. The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced. See *Doe II*, *supra*, at 209; *Doe I*, *supra*, at 612–614, and n. 13; *Fisher*, *supra*, at 410–413. But a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded. *Doe I*, 465 U. S., at 612, and n. 10; *id.*, at 618 (O'CONNOR, J., concurring); *Fisher*, *supra*, at 408–410. Bouknight therefore cannot claim the privilege based upon anything that examination of Maurice might reveal, nor can she assert the privilege upon the theory that compliance would assert that the child produced is in fact Maurice (a fact the State could readily establish, rendering any testimony regarding existence or authenticity insufficiently incriminating, see *Fisher*, *supra*, at 411). Rather, Bouknight claims the benefit of the privilege because the act of production would amount to testimony regarding her control over, and possession of, Maurice. Although the State could readily introduce evidence of Bouknight's continuing control over the child—*e. g.*, the custody order, testimony of relatives, and Bouknight's own statements to Maryland officials before invoking the privilege—her implicit communication of control over Maurice at the moment of production might aid the State in prosecuting Bouknight.

The possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production. See *infra*, at 556–558. Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," *Fisher*, *supra*, at 411, Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties re-

lated to production and because production is required as part of a noncriminal regulatory regime.

The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws. In *Shapiro* v. *United States*, 335 U. S. 1 (1948), the Court considered an application of the Emergency Price Control Act of 1942 and a regulation issued thereunder which required licensed businesses to maintain records and make them available for inspection by administrators. The Court indicated that no Fifth Amendment protection attached to production of the "required records," which the "'defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection.'" *Id.*, at 17–18 (quoting *Wilson* v. *United States*, 221 U. S. 361, 381 (1911)). The Court's discussion of the constitutional implications of the scheme focused upon the relation between the Government's regulatory objectives and the Government's interest in gaining access to the records in Shapiro's possession:

> "It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." 335 U. S., at 32.

See also *In re Harris*, 221 U. S. 274, 279 (1911) (Holmes, J.) (regarding a court order that a bankrupt produce account

books, "[t]he question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, past or future, but of compelling him to yield possession of property that he no longer is entitled to keep"). The Court has since refined those limits to the government's authority to gain access to items or information vested with this public character. The Court has noted that "the requirements at issue in *Shapiro* were imposed in 'an essentially non-criminal and regulatory area of inquiry,'" and that *Shapiro*'s reach is limited where requirements "are directed to a 'selective group inherently suspect of criminal activities.'" *Marchetti* v. *United States*, 390 U. S. 39, 57 (1968) (quoting *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 79 (1965)); see *Grosso* v. *United States*, 390 U. S. 62, 68 (1968) (*Shapiro* inapplicable because "[h]ere, as in *Marchetti*, the statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities"); *Haynes* v. *United States*, 390 U. S. 85, 98–99 (1968).

California v. *Byers*, 402 U. S. 424 (1971), confirms that the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement. In *Byers*, the Court upheld enforcement of California's statutory requirement that drivers of cars involved in accidents stop and provide their names and addresses. A plurality found the risk of incrimination too insubstantial to implicate the Fifth Amendment, *id.*, at 427–428, and noted that the statute "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities," *id.*, at 430, was "'directed at the public at large,'" *ibid.* (quoting *Albertson* v. *Subversive Activities Control Board*, *supra*, at 79), and required disclosure of no inherently illegal activity. See also *United States* v. *Sullivan*, 274 U. S. 259 (1927) (rejecting Fifth Amendment objection to requirement to file income tax return). Justice Harlan, the author of *Marchetti*, *Grosso*, and *Haynes*, concurred in the judgment. He distin-

guished those three cases as considering statutory schemes that "focused almost exclusively on conduct which was criminal," 402 U. S., at 454. While acknowledging that in particular cases the California statute would compel incriminating testimony, he concluded that the noncriminal purpose and the general applicability of the reporting requirement demanded compliance even in such cases. *Id.*, at 458.

When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced. In *Wilson* v. *United States*, *supra*, the Court surveyed a range of cases involving the custody of public documents and records required by law to be kept because they related to "the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." *Id.*, at 380. The principle the Court drew from these cases is:

> "[W]here, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection." *Id.*, at 382.

See also *Braswell* v. *United States*, 487 U. S. 99, 109–113 (1988); *Curcio* v. *United States*, 354 U. S. 118, 123–124 (1957) ("A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers"). In *Shapiro*, the Court interpreted this principle as extending well beyond the corporate context, 335 U. S., at 16–20, and emphasized that Shapiro had assumed and retained control over documents in which the Government had a direct and particular regulatory interest. *Id.*, at 7–8, 14–15. Indeed, it was in part Shapiro's custody over items having this public nature that allowed the Court in *Marchetti*, *supra*, at 57, *Grosso*, *supra*, at 69, and *Haynes*, *supra*, at 99, to dis-

tinguish the measures considered in those cases from the regulatory requirement at issue in *Shapiro*.

These principles readily apply to this case. Once Maurice was adjudicated a child in need of assistance, his care and safety became the particular object of the State's regulatory interests. See 314 Md., at 404, 550 A. 2d, at 1141; Md. Cts. & Jud. Proc. Code Ann. §§ 3–801(e), 3–804(a) (Supp. 1989); see also App. 105 ("This court has jurisdiction to require at all times to know the whereabouts of the minor child. We asserted jurisdiction over that child in the spring of 1987 . . ."). Maryland first placed Maurice in shelter care, authorized placement in foster care, and then entrusted responsibility for Maurice's care to Bouknight. By accepting care of Maurice subject to the custodial order's conditions (including requirements that she cooperate with BCDSS, follow a prescribed training regime, and be subject to further court orders), Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the State's regulatory interests and subject to inspection by BCDSS. Cf. *Shapiro* v. *United States*, *supra*. In assuming the obligations attending custody, Bouknight "has accepted the incident obligation to permit inspection." *Wilson*, 221 U. S., at 382. The State imposes and enforces that obligation as part of a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders. See Md. Cts. & Jud. Proc. Code Ann. § 3–802(a) (1984) (setting forth child protective purposes of subtitle, including "provid[ing] for the care, protection, and wholesome mental and physical development of children coming within the provisions of this subtitle"); see also Md. Cts. & Jud. Proc. Code Ann. §§ 3–820(b), (c) (Supp. 1989); *In re Jessica M.*, 312 Md. 93, 538 A. 2d 305 (1988).

Persons who care for children pursuant to a custody order, and who may be subject to a request for access to the child, are hardly a "'selective group inherently suspect of criminal activities.'" *Marchetti*, *supra*, at 57 (quoting *Albertson* v.

Subversive Activities Control Board, 382 U. S., at 79). The juvenile court may place a child within its jurisdiction with social service officials or "under supervision in his own home or in the custody or under the guardianship of a relative or other fit person, upon terms the court deems appropriate." Md. Cts. & Jud. Proc. Code Ann. § 3–820(c)(1)(i) (Supp. 1989). Children may be placed, for example, in foster care, in homes of relatives, or in the care of state officials. See, *e. g.*, *In re Jessica M.*, *supra; In re Arlene G.*, 301 Md. 355, 483 A. 2d 39 (1984); *Maryland Dept. of Health and Mental Hygiene* v. *Prince George's County Dept. of Social Services*, 47 Md. App. 436, 423 A. 2d 589 (1980). Even when the court allows a parent to retain control of a child within the court's jurisdiction, that parent is not one singled out for criminal conduct, but rather has been deemed to be, without the State's assistance, simply "unable or unwilling to give proper care and attention to the child and his problems." Md. Cts. & Jud. Proc. Code Ann. § 3–801(e) (Supp. 1989); see *In re Jertrude O.*, 56 Md. App. 83, 466 A. 2d 885 (1983), cert. denied, 298 Md. 309, 469 A. 2d 863 (1984). The provision that authorized the juvenile court's efforts to gain production of Maurice reflects this broad applicability. See Md. Cts. & Jud. Proc. Code Ann. § 3–814(c) (1984) ("If a parent, guardian, or custodian fails to bring the child before the court when requested, the court may issue a writ of attachment directing that the child be taken into custody and brought before the court. The court may proceed against the parent, guardian, or custodian for contempt"). This provision "fairly may be said to be directed at . . . parents, guardians, and custodians who accept placement of juveniles in custody." 314 Md., at 418, 550 A. 2d, at 1148 (McAuliffe, J., dissenting).

Similarly, BCDSS' efforts to gain access to children, as well as judicial efforts to the same effect, do not "focu[s] almost exclusively on conduct which was criminal." *Byers*, 402 U. S., at 454 (Harlan, J., concurring in judgment). Many orders will arise in circumstances entirely devoid of

criminal conduct. Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigation. See Maryland Cts. & Jud. Proc. Code Ann. § 3–814(c) (1984). This case provides an illustration: concern for the child's safety underlay the efforts to gain access to and then compel production of Maurice. See App. 33–39, 53–55, 150, 155–158; see also 314 Md., at 419, 550 A. 2d, at 1149 (McAuliffe, J., dissenting). Finally, production in the vast majority of cases will embody no incriminating testimony, even if in particular cases the act of production may incriminate the custodian through an assertion of possession or the existence, or the identity, of the child. Cf. *Byers*, 402 U. S., at 430–431; *id.*, at 458 (Harlan, J., concurring in judgment). These orders to produce children cannot be characterized as efforts to gain some testimonial component of the act of production. The government demands production of the very public charge entrusted to a custodian, and makes the demand for compelling reasons unrelated to criminal law enforcement and as part of a broadly applied regulatory regime. In these circumstances, Bouknight cannot invoke the privilege to resist the order to produce Maurice.

We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony. See *Braswell*, 487 U. S., at 118, and n. 11. The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies

with the regulatory requirement after invoking the privilege and subsequently faces prosecution. See *Marchetti*, 390 U. S., at 58–59 (the "attractive and apparently practical" course of subsequent use restriction is not appropriate where a significant element of the regulatory requirement is to aid law enforcement); see also *Leary* v. *United States*, 395 U. S. 6, 26–27 (1969); *Haynes*, 390 U. S., at 100; *Grosso*, 390 U. S., at 69; cf. *Doe I*, 465 U. S., at 617, n. 17 (scope of restriction). In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled. See *Simmons* v. *United States*, 390 U. S. 377, 391–394 (1968) (no subsequent admission of testimony provided in suppression hearing); *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U. S. 52, 75–76, 79 (1964) (Fifth Amendment bars use, in criminal processes, in other jurisdictions of testimony compelled pursuant to a grant of use immunity in one jurisdiction); *Maness* v. *Meyers*, 419 U. S. 449, 474–475 (1975) (WHITE, J., concurring in result); *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954) ("[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute"); see also *New Jersey* v. *Portash*, 440 U. S. 450 (1979); *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967). But cf. *Doe I*, *supra*, at 616–617 (construing federal use immunity statute, 18 U. S. C. §§ 6001–6005); *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 261–262 (1983) (declining to supplement previous grant of federal use immunity).

III

The judgment of the Court of Appeals of Maryland is reversed, and the cases are remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Although the Court assumes that respondent's act of producing her child would be testimonial and could be incriminating, *ante*, at 555, it nonetheless concludes that she cannot invoke her privilege against self-incrimination and refuse to reveal her son's current location. Neither of the reasons the Court articulates to support its refusal to permit respondent to invoke her constitutional privilege justifies its decision. I therefore dissent.

I

The Court correctly assumes, *ante*, at 555, that Bouknight's production of her son to the Maryland court would be testimonial because it would amount to an admission of Bouknight's physical control over her son. See *Fisher* v. *United States*, 425 U. S. 391, 410 (1976) (acts of production are testimonial if they contain implicit statement of fact). Accord, *United States* v. *Doe*, 465 U. S. 605, 612–613 (1984). The Court also assumes, *ante*, at 555, that Bouknight's act of production would be self-incriminating. I would not hesitate to hold explicitly that Bouknight's admission of possession or control presents a "'real and appreciable'" threat of self-incrimination. *Marchetti* v. *United States*, 390 U. S. 39, 48 (1968). Bouknight's ability to produce the child would conclusively establish her actual and present physical control over him, and thus might "prove a significant 'link in a chain' of evidence tending to establish [her] guilt." *Ibid.* (footnote omitted).

Indeed, the stakes for Bouknight are much greater than the Court suggests. Not only could she face criminal abuse and neglect charges for her alleged mistreatment of Maurice, but she could also be charged with causing his death. The State acknowledges that it suspects that Maurice is dead, and the police are investigating his case as a possible homicide.

In these circumstances, the potentially incriminating aspects to Bouknight's act of production are undoubtedly significant.

II

Notwithstanding the real threat of self-incrimination, the Court holds that "Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime." *Ante*, at 555–556. In characterizing Bouknight as Maurice's "custodian," and in describing the relevant Maryland juvenile statutes as part of a noncriminal regulatory regime, the Court relies on two distinct lines of Fifth Amendment precedent, neither of which applies to this litigation.

A

The Court's first line of reasoning turns on its view that Bouknight has agreed to exercise on behalf of the State certain custodial obligations with respect to her son, obligations that the Court analogizes to those of a custodian of the records of a collective entity. See *ante*, at 558–559. This characterization is baffling, both because it is contrary to the facts of this case and because this Court has never relied on such a characterization to override the privilege against self-incrimination except in the context of a claim of privilege by an agent of a collective entity.[1]

[1]The Court claims that the principle espoused in the collective entity cases was "extend[ed] well beyond the corporate context" in *Shapiro* v. *United States*, 335 U. S. 1 (1948). *Ante*, at 558. *Shapiro*, however, did not rest on the existence of an agency relationship between a collective entity and the custodian of its records. Instead, the petitioner was denied the Fifth Amendment privilege because the records sought were kept as part of a generalized regulatory system that required all businesses, unincorporated as well as incorporated, to retain records of certain transactions. See 335 U. S., at 22–23, 27, 33. *Shapiro* turned on the Court's view "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate sub-

Jacqueline Bouknight is Maurice's mother; she is not, and in fact could not be, his "custodian" whose rights and duties are determined solely by the Maryland juvenile protection law. See Md. Cts. & Jud. Proc. Code Ann. § 3–801(j) (Supp. 1989) (defining "custodian" as "person or agency to whom legal custody of a child has been given by order of the court, other than the child's parent or legal guardian"). Although Bouknight surrendered physical custody of her child during the pendency of the proceedings to determine whether Maurice was a "child in need of assistance" (CINA) within the meaning of the Maryland Code, § 3–801(e), Maurice's placement in shelter care was only temporary and did not extinguish her legal right to custody of her son. See § 3–801(r). When the CINA proceedings were settled, Bouknight regained physical custody of Maurice and entered into an agreement with the Baltimore City Department of Social Services (BCDSS). In that agreement, which was approved by the juvenile court, Bouknight promised, among other things, to "cooperate with BCDSS," App. 28, but she retained legal custody of Maurice.

A finding that a child is in need of assistance does not by itself divest a parent of legal or physical custody, nor does it transform such custody to something conferred by the State. See, *e. g.*, *In re Jertrude O.*, 56 Md. App. 83, 97–98, 466 A. 2d 885, 893 (1983) (proving a child is a CINA differs significantly from proving that the parent's rights to legal and physical custody should be terminated). Thus, the parent of a CINA continues to exercise custody because she is

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jects of governmental regulation and the enforcement of restrictions validly established.'" *Id.*, at 33 (quoting *Davis* v. *United States*, 328 U. S. 582, 589–590 (1946)). See also *Marchetti* v. *United States*, 390 U. S. 39, 57 (1968) (describing rationale in *Shapiro*); *ante*, at 558 (emphasizing that Shapiro had custody of "documents in which the Government had *a direct and particular regulatory interest*" (emphasis added)). Thus, *Shapiro* is properly analyzed with the cases concerning testimony required as a part of a noncriminal regulatory regime, rather than with the cases concerning testimony compelled from custodians of collective entities' records.

the child's parent, not because the State has delegated that responsibility to her. Although the State has obligations "[t]o provide for the care, protection, and wholesome mental and physical development of children" who are in need of assistance, Md. Cts. & Jud. Proc. Code Ann. §3–802(a)(1) (1984), these duties do not eliminate or override a parent's continuing legal obligations similarly to provide for her child.

In light of the statutory structure governing a parent's relationship to a CINA, Bouknight is not acting as a custodian in the traditional sense of that word because she is not acting *on behalf of the State*. In reality, she continues to exercise her parental duties, constrained by an agreement between her and the State. That agreement, which includes a stipulation that Maurice was a CINA, allows the State, in certain circumstances, to intercede in Bouknight's relationship with her child. It does not, however, confer custodial rights and obligations on Bouknight in the same way corporate law creates the custodial status of a corporate agent.

Moreover, the rationale for denying a corporate custodian Fifth Amendment protection for acts done in her representative capacity does not apply to this case. The rule for a custodian of corporate records rests on the well-established principle that a collective entity, unlike a natural person, has no Fifth Amendment privilege against self-incrimination. See *Hale* v. *Henkel*, 201 U. S. 43, 69–70 (1906) (corporation has no privilege); *United States* v. *White*, 322 U. S. 694, 701 (1944) (labor union has no privilege). Because an artificial entity can act only through its agents, a custodian of such an entity's documents may not invoke her personal privilege to resist producing documents that may incriminate the entity, even if the documents may also incriminate the custodian. *Wilson* v. *United States*, 221 U. S. 361, 384–385 (1911). As we explained in *White:*

> "[I]ndividuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely per-

> sonal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. . . . And the official records and documents of the organization that are held by them *in a representative rather than in a personal capacity* cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." 322 U. S., at 699 (citations omitted; emphasis added).

Jacqueline Bouknight is not the agent for an artificial entity that possesses no Fifth Amendment privilege. Her role as Maurice's parent is very different from the role of a corporate custodian who is merely the instrumentality through whom the corporation acts. I am unwilling to extend the collective entity doctrine into a context where it denies individuals, acting in their personal rather than representative capacities, their constitutional privilege against self-incrimination.

B

The Court's decision rests as well on cases holding that "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." *Ante*, at 557. The cases the Court cites have two common features: they concern civil regulatory systems not primarily intended to facilitate criminal investigations, and they target the general public. See *California* v. *Byers*, 402 U. S. 424, 430–431 (1971) (determining that a "hit and run" statute that required a driver involved in an accident to stop and give certain information was primarily civil). In contrast, regulatory regimes that are directed at a "'selective group inherently suspect of criminal activities,'" *Marchetti*, 390 U. S., at 57 (quoting *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 79 (1965)), do not result in a similar diminution of the Fifth Amendment privilege.

1

Applying the first feature to this case, the Court describes Maryland's juvenile protection scheme as "a broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders." *Ante*, at 559. The Court concludes that Bouknight cannot resist an order necessary for the functioning of that system. The Court's characterization of Maryland's system is dubious and highlights the flaws inherent in the Court's formulation of the appropriate Fifth Amendment inquiry. Virtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly or, as in this case, *solely* to the avowed noncriminal purpose of the regulations. If one focuses instead on the practical effects, the same scheme could be seen as facilitating criminal investigations. The fact that the Court holds Maryland's juvenile statute to be essentially noncriminal, notwithstanding the overlapping purposes underlying that statute and Maryland's criminal child abuse statutes, proves that the Court's test will never be used to find a relationship between the civil scheme and law enforcement goals significant enough to implicate the Fifth Amendment.

The regulations embodied in the juvenile welfare statute are intimately related to the enforcement of state criminal statutes prohibiting child abuse, Md. Ann. Code, Art. 27, § 35A (1987). State criminal decisions suggest that information supporting criminal convictions is often obtained through civil proceedings and the subsequent protective oversight by BCDSS. See, *e. g.*, *Lee* v. *State*, 62 Md. App. 341, 489 A. 2d 87 (1985). See also 3 Code of Md. Regs. §§ 07.02.07.08(A)(1) and 07.02.07.08(C)(1)(b) (1988) (requiring Social Services Administration to maintain a Child Abuse Central Registry and allowing law enforcement officials access to the Registry). In this respect, Maryland's juvenile protection system resembles the revenue system at issue in *Marchetti*, which required persons engaged in the business of accepting wagers to provide certain information about their activities to the

Federal Government. Focusing on the effects of the regulatory scheme, the Court held that this revenue system was not the sort of neutral civil regulatory scheme that could trump the Fifth Amendment privilege. Even though the Government's "principal interest [was] evidently the collection of revenue," 390 U. S., at 57, the information sought would increase the "likelihood that any past or present gambling offenses [would] be discovered and successfully prosecuted," *id.*, at 52.

In contrast to *Marchetti*, the Court here disregards the practical implications of the civil scheme and holds that the juvenile protection system does not "'focu[s] almost exclusively on conduct which was criminal.'" *Ante*, at 560 (quoting *Byers*, *supra*, at 454 (Harlan, J., concurring in judgment). See also *Byers*, *supra*, at 430 (plurality opinion) (determining statute at issue to be "essentially regulatory, not criminal"). I cannot agree with this approach. The State's goal of protecting children from abusive environments through its juvenile welfare system cannot be separated from criminal provisions that serve the same goal. When the conduct at which a civil statute aims—here, child abuse and neglect—is frequently the same conduct subject to criminal sanction, it strikes me as deeply problematic to dismiss the Fifth Amendment concerns by characterizing the civil scheme as "unrelated to criminal law enforcement or investigation," *ante*, at 561. A civil scheme that *inevitably* intersects with criminal sanctions may not be used to coerce, on pain of contempt, a potential criminal defendant to furnish evidence crucial to the success of her own prosecution.

I would apply a different analysis, one that is more faithful to the concerns underlying the Fifth Amendment. This approach would target respondent's particular claim of privilege, the precise nature of the testimony sought, and the likelihood of self-incrimination caused by this respondent's compliance. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in

which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U. S. 479, 486–487 (1951). Accord, *Marchetti*, *supra*, at 48; *Malloy* v. *Hogan*, 378 U. S. 1, 11–12 (1964). This analysis unambiguously indicates that Bouknight's Fifth Amendment privilege must be respected to protect her from the serious risk of self-incrimination. See *supra*, at 563–564.

An individualized inquiry is preferable to the Court's analysis because it allows the privilege to turn on the concrete facts of a particular case, rather than on abstract characterizations concerning the nature of a regulatory scheme. Moreover, this particularized analysis would not undermine any appropriate goals of civil regulatory schemes that may intersect with criminal prohibitions. Instead, the ability of a State to provide immunity from criminal prosecution permits it to gather information necessary for civil regulation, while also preserving the integrity of the privilege against self-incrimination. The fact that the State throws a wide net in seeking information does not mean that it can demand from the few persons whose Fifth Amendment rights are implicated that they participate in their own criminal prosecutions. Rather, when the State demands testimony from its citizens, it should do so with an explicit grant of immunity.

2

The Court's approach includes a second element; it holds that a civil regulatory scheme cannot override Fifth Amendment protection unless it is targeted at the general public. Such an analysis would not be necessary under the particularized approach I advocate. Even under the Court's test, however, Bouknight's right against self-incrimination should not be diminished because Maryland's juvenile welfare scheme clearly is *not* generally applicable. A child is considered in need of assistance because "[h]e is mentally handi-

capped or is not receiving ordinary and proper care and attention, and . . . [h]is parents . . . are unable or unwilling to give proper care and attention to the child and his problems." Md. Cts. & Jud. Proc. Code Ann. §3–801(e) (Supp. 1989). The juvenile court has jurisdiction only over children who are alleged to be in need of assistance, not over all children in the State. See §3–804(a). It thus has power to compel testimony only from those parents whose children are alleged to be CINA's. In other words, the regulatory scheme that the Court describes as "broadly directed," *ante*, at 559, is actually narrowly targeted at parents who through abuse or neglect deny their children the minimal reasonable level of care and attention. Not all such abuse or neglect rises to the level of criminal child abuse, but parents of children who have been so seriously neglected or abused as to warrant allegations that the children are in need of state assistance are clearly "a selective group inherently suspect of criminal activities." See *supra*, at 567.

III

In the end, neither line of precedents relied on by the Court justifies riding roughshod over Bouknight's constitutional privilege against self-incrimination. The Court cannot accurately characterize her as a "custodian" in the same sense as the Court has used that word in the past. Nor is she the State's "agent," whom the State may require to act on its behalf. Moreover, the regulatory scheme at issue here is closely intertwined with the criminal regime prohibiting child abuse and applies only to parents whose abuse or neglect is serious enough to warrant state intervention.

Although I am disturbed by the Court's willingness to apply inapposite precedent to deny Bouknight her constitutional right against self-incrimination, especially in light of the serious allegations of homicide that accompany this civil proceeding, I take some comfort in the Court's recognition that the State may be prohibited from using any testimony given by Bouknight in subsequent criminal proceedings.

Ante, at 561 (leaving open the question of the "State's ability to use the testimonial aspects of Bouknight's act of production" in such criminal proceedings).[2] Because I am not content to deny Bouknight the constitutional protection required by the Fifth Amendment *now* in the hope that she will not be convicted *later* on the basis of her own testimony, I dissent.

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[2] I note, with both exasperation and skepticism about the bona fide nature of the State's intentions, that the State may be able to grant Bouknight use immunity under a recently enacted immunity statute, even though it has thus far failed to do so. See 1989 Md. Laws, ch. 288 (amending § 9–123). Although the statute applies only to testimony "in a criminal prosecution or a proceeding before a grand jury of the State," Md. Cts. & Jud. Proc. Code Ann. § 9–123(b)(1) (Supp. 1989), the State represented to this Court that "[a]s a matter of law, [granting limited use immunity for the testimonial aspects of Bouknight's compliance with the production order] would now be possible," Tr. of Oral Arg. 10. If such a grant of immunity has been possible since July 1989 and the State has refused to invoke it so that it can litigate Bouknight's claim of privilege, I have difficulty believing that the State is sincere in its protestations of concern for Maurice's well-being.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 572 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR OCTOBER 2, 1989, THROUGH FEBRUARY 20, 1990

OCTOBER 2, 1989

Appeals Dismissed

No. 88–1891. M & M CONSTRUCTION CO., INC. *v.* GREAT AMERICAN INSURANCE CO. Appeal from Ct. App. Tex., 13th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 749 S. W. 2d 526.

No. 88–7460. CRUMPACKER *v.* INDIANA ET AL. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 88–1770. WESTINGHOUSE ELECTRIC CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989). Reported below: 869 F. 2d 696.

No. 88–2034. DENTON ET AL. *v.* HERNANDEZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Neitzke* v. *Williams*, 490 U. S. 319 (1989). Reported below: 861 F. 2d 1421.

No. 88–7343. ENGLISH ET AL. *v.* SIDDENS ET AL. C. A. 7th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reed* v. *United Transportation Union*, 488 U. S. 319 (1989). Reported below: 863 F. 2d 885.

Miscellaneous Orders

No. — — —. POSEY *v.* DEPARTMENT OF THE AIR FORCE; and

No. — — ——. YANG *v.* MCCARTHY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–138 (89–127). CASTIGLIONE *v.* UNITED STATES. C. A. 9th Cir. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–179 (89–352). SILVERSTEIN *v.* NEW YORK. Ct. App. N. Y. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $4,313.43 for the period April 1 through June 30, 1989, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 492 U. S. 915.]

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 490 U. S. 1033.]

No. 87–1387. WARDS COVE PACKING CO., INC., ET AL. *v.* ATONIO ET AL., 490 U. S. 642. Motion of respondents to retax costs denied.

No. 87–2048. TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1105.] Motion of National Coalition of Petroleum Retailers for leave to file a brief as *amicus curiae* granted.

No. 88–790. TURNOCK, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, ET AL. *v.* RAGSDALE ET AL. C. A. 7th Cir. [Probable jurisdiction postponed, 492 U. S. 916.] Motion of Alan Ernest for leave to represent children unborn and born alive denied. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Larry Joyce for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 88–805. OHIO *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 492 U. S. 916.] Motion of Alan Ernest for leave to represent children unborn and born alive denied. Motion of Legal Defense for Un-

born Children for leave to file a brief as *amicus curiae* denied. Motion of James Joseph Lynch, Jr., for leave to file a brief as *amicus curiae* denied.

No. 88–870. LONGO ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. [Certiorari granted, 489 U. S. 1064.] Motion of petitioners for leave to file a reply brief out of time granted.

No. 88–931. CRANDON ET AL. *v.* UNITED STATES; and
No. 88–938. BOEING CO., INC. *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 490 U. S. 1003.] Motion of petitioners for divided argument granted.

No. 88–1125. HODGSON ET AL. *v.* MINNESOTA ET AL. C. A. 8th Cir. [Certiorari granted, 492 U. S. 917.] Motion of Alan Ernest for leave to represent children unborn and born alive denied. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 88–1400. FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL. C. A. 7th Cir. [Certiorari granted, 490 U. S. 1019.] Motion of respondents for divided argument denied.

No. 88–1474. UNITED STATES *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. Fed. Cir. [Certiorari granted, 490 U. S. 1045.] Motion of Vulcan Materials Co. for leave to file a brief as *amicus curiae* granted.

No. 88–1775. PEEL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. [Certiorari granted, 492 U. S. 917.] Motions for leave to file briefs as *amici curiae* filed by the following are granted: Academy of Certified Trial Lawyers of Minnesota, American Advertising Federation, Inc., Public Citizen, Association of Trial Lawyers of America et al., Association of National Advertisers, Inc., and Washington Legal Foundation et al.

No. 88–1958. SUPREME BEEF PROCESSORS, INC. *v.* YAQUINTO, TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC. C. A. 5th Cir.;
No. 88–2009. RICHARDSON ET AL. *v.* UNITED STEELWORKERS OF AMERICA. C. A. 5th Cir.;
No. 88–2041. SISSON *v.* RUBY ET AL. C. A. 7th Cir.;

No. 88–2062. COTTON *v.* BABCOCK, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir.;

No. 88–2109. KANSAS ET AL. *v.* KANSAS POWER & LIGHT CO. ET AL. C. A. 10th Cir.;

No. 88–2117. INCOME SECURITY CORP., INC., ET AL. *v.* LOUISIANA OILFIELD CONTRACTORS ASSN., INC., ET AL. C. A. 5th Cir.;

No. 89–46. WOOD ET AL. *v.* GENERAL MOTORS CORP. C. A. 1st Cir.;

No. 89–56. ALLEVATO, PERSONAL REPRESENTATIVE OF THE ESTATE OF FERRANTINO, ET AL. *v.* COUNTY OF OAKLAND ET AL. C. A. 6th Cir.;

No. 89–79. CITY OF DETROIT *v.* COUNTY OF OAKLAND ET AL. C. A. 6th Cir.; and

No. 89–101. YOUNG, MAYOR OF THE CITY OF DETROIT *v.* COUNTY OF OAKLAND ET AL. C. A. 6th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 88–6075. JAMES *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, 489 U. S. 1010.] Motion of petitioner for leave to file a reply brief out of time granted.

No. 88–7146. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL. Sup. Ct. Ark. [Certiorari granted, 492 U. S. 917.] Motion for appointment of counsel granted, and it is ordered that Arthur L. Allen, Esq., of Little Rock, Ark., be appointed to serve as counsel for petitioner in this case.

No. 88–7309. NOLLSCH *v.* WYOMING. Sup. Ct. Wyo.; and

No. 88–7487. STENGEL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 23, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–7322. STUMPF *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir.;

No. 88–7356. CARR *v.* UNITED STATES. C. A. Fed. Cir.; and

No. 88–7583. ROCHE *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 23, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–7381. BONIN *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to file an amendment to the petition for writ of certiorari granted.

No. 88–7626. RIVERA *v.* OROWEAT FOODS CO., INC., ET AL. C. A. 9th Cir.;

No. 89–5159. MALONE *v.* SHELBY COUNTY BOARD OF EDUCATION ET AL. Ct. App. Tenn.; and

No. 89–5333. JOSHUA ET UX. *v.* NEWELL, FOSTER HOME LICENSOR, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 23, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 89–5021. IN RE TILLMAN. C. A. 7th Cir. Petition for writ of common-law certiorari denied.

No. 88–7548. IN RE GREEN;

No. 89–5005. IN RE WOLF;

No. 89–5032. IN RE MCCABE;
No. 89–5090. IN RE EZEODO;
No. 89–5125. IN RE SUMMERS;
No. 89–5306. IN RE RED BEAR;
No. 89–5316. IN RE D'ANGELO;
No. 89–5407. IN RE KLUVER; and
No. 89–5440. IN RE SCHLAEBITZ. Petitions for writs of habeas corpus denied.

No. 88–7243. IN RE DEBARDELEBEN;
No. 88–7346. IN RE STARLING;
No. 88–7615. IN RE FIELDS, AKA SCOTT;
No. 89–5002. IN RE BONNETT;
No. 89–5030. IN RE AGOMO;
No. 89–5155. IN RE LAY;
No. 89–5174. IN RE MICKENS;
No. 89–5199. IN RE PHILLIPS; and
No. 89–5263. IN RE MARTIN. Petitions for writs of mandamus denied.

No. 88–7221. IN RE MARTIN;
No. 88–7314. IN RE BAILEY;
No. 89–5253. IN RE HAUGEN; and
No. 89–5266. IN RE HOLLINGSWORTH. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 88–1725. VENEGAS *v.* MITCHELL. C. A. 9th Cir. Certiorari granted. Reported below: 867 F. 2d 527.

No. 88–1897. MICHIGAN DEPARTMENT OF STATE POLICE ET AL. *v.* SITZ ET AL. Ct. App. Mich. Certiorari granted. Reported below: 170 Mich. App. 433, 429 N. W. 2d 180.

No. 88–1905. KELLER ET AL. *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari granted. Reported below: 47 Cal. 3d 1152, 767 P. 2d 1020.

No. 88–1916. MINNESOTA *v.* OLSON. Sup. Ct. Minn. Certiorari granted. Reported below: 436 N. W. 2d 92.

No. 88–1943. OFFICE OF PERSONNEL MANAGEMENT *v.* RICHMOND. C. A. Fed. Cir. Certiorari granted. Reported below: 862 F. 2d 294.

No. 88–1951. UNITED STATES *v.* DALM. C. A. 6th Cir. Certiorari granted. Reported below: 867 F. 2d 305.

No. 88–1993. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* SMITH. C. A. 11th Cir. Certiorari granted. Reported below: 866 F. 2d 1318.

No. 88–2031. UNITED STATES *v.* KOKINDA ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 866 F. 2d 699.

No. 88–2102. STEWART ET AL. *v.* ABEND, DBA AUTHORS RESEARCH CO. C. A. 9th Cir. Certiorari granted. Reported below: 863 F. 2d 1465.

No. 88–2123. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 274 U. S. App. D. C. 135, 862 F. 2d 880.

No. 89–44. BURNHAM *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN (BURNHAM, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari granted.

No. 89–65. FORT STEWART SCHOOLS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 860 F. 2d 396.

No. 89–163. UNITED STATES *v.* MONTALVO-MURILLO. C. A. 10th Cir. Certiorari granted. Reported below: 876 F. 2d 826.

No. 88–1281. NGIRAINGAS ET AL. *v.* SANCHEZ ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 858 F. 2d 1368.

No. 88–1671. UNITED STATES DEPARTMENT OF LABOR *v.* TRIPLETT ET AL.; and

No. 88–1688. COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR *v.* TRIPLETT ET AL. Sup. Ct. App. W. Va. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 180 W. Va. 533, 378 S. E. 2d 82.

No. 88–1872. RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL.; and

No. 88–2074. FRECH ET AL. *v.* RUTAN ET AL. C. A. 7th Cir. Motion of Independent Voters of Illinois Independent Precinct Organization et al. for leave to file a brief as *amici curiae* in No. 88–1872 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 868 F. 2d 943.

No. 88–1932. UNITED STATES *v.* MUNOZ-FLORES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. In addressing the justiciability issues presented in this case, the parties are requested to brief the applicability of the political question doctrine. Reported below: 863 F. 2d 654.

No. 88–1972. ILLINOIS *v.* PERKINS. App. Ct. Ill., 5th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 176 Ill. App. 3d 443, 531 N. E. 2d 141.

No. 89–156. PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* DAVENPORT ET UX. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 871 F. 2d 421.

No. 88–2035. ADAMS FRUIT CO., INC. *v.* BARRETT ET AL. C. A. 11th Cir. Motion of National Council of Self-Insurers for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 867 F. 2d 1305.

No. 88–2043. BALILES, GOVERNOR OF VIRGINIA, ET AL. *v.* VIRGINIA HOSPITAL ASSN. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 868 F. 2d 653.

No. 88–7351. WALTON *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 159 Ariz. 571, 769 P. 2d 1017.

Certiorari Denied. (See also Nos. 88–1891, 88–7460, and 89–5021, *supra*.)

No. 88–1635. TRUESDALE *v.* UNIVERSITY OF NORTH CAROLINA ET AL. Ct. App. N. C. Certiorari denied. Reported below: 91 N. C. App. 186, 371 S. E. 2d 503.

No. 88–1637. DALSHEIM, SUPERINTENDENT, DOWNSTATE CORRECTIONAL FACILITY, ET AL. *v.* INNES. C. A. 2d Cir. Certiorari denied. Reported below: 864 F. 2d 974.

No. 88–1639. MACKS *v.* WERNICK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 153, 530 N. E. 2d 1127.

No. 88–1647. MCKINNON *v.* CITY OF BERWYN ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–1677. KITCHENS ET AL. *v.* OREGON EX REL. ADULT AND FAMILY SERVICES DIVISION. Ct. App. Ore. Certiorari denied. Reported below: 93 Ore. App. 685, 763 P. 2d 1196.

No. 88–1680. VENEMON ET AL. *v.* DAVISON. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1477.

No. 88–1698. PHELPS DODGE CORP. *v.* UNITED STEELWORKERS OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 1539.

No. 88–1708. SPAWR OPTICAL RESEARCH, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 864 F. 2d 1467.

No. 88–1710. GREENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 1512.

No. 88–1713. O'BRIEN *v.* STEIN ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 47 Ohio App. 3d 191, 547 N. E. 2d 1213.

No. 88–1723. ARCHER-DANIELS-MIDLAND CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 2d 242.

No. 88–1735. APPERSON *v.* FLEET CARRIER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 2d 431.

No. 88–1737. BARBEE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 616.

No. 88–1764. POST *v.* GARCIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1089.

No. 88–1783. ASTA ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 126 Ill. 2d 356, 534 N. E. 2d 962.

No. 88–1789. FREEDE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 864 F. 2d 671.

No. 88–1797. GOETHE HOUSE NEW YORK, GERMAN CULTURAL CENTER *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 75.

No. 88–1806. LAND AIR DELIVERY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 127, 862 F. 2d 354.

No. 88–1808. BUSHMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 862 F. 2d 1327.

No. 88–1826. BARROW *v.* KING ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1828. BERKLEE COLLEGE OF MUSIC *v.* BERKLEE CHAPTER OF THE MASSACHUSETTS FEDERATION OF TEACHERS, LOCAL 4412, AFT, AFL–CIO. C. A. 1st Cir. Certiorari denied. Reported below: 858 F. 2d 31.

No. 88–1832. DOHERTY *v.* SOUTHERN COLLEGE OF OPTOMETRY. C. A. 6th Cir. Certiorari denied. Reported below: 862 F. 2d 570.

No. 88–1842. PORCELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 865 F. 2d 1352.

No. 88–1848. GENERAL MOTORS CORP. *v.* SKELTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 250.

No. 88–1850. SEVENTY-TWO THOUSAND, NINE HUNDRED AND FORTY DOLLARS IN UNITED STATES CURRENCY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1080.

No. 88–1852. BRADLEY FACILITIES, INC. *v.* BURNS, COMMISSIONER OF TRANSPORTATION OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 209 Conn. 480, 551 A. 2d 746.

No. 88–1858. COFFIN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 608.

No. 88–1859. JOHNSON *v.* UNITED STATES POSTAL SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 861 F. 2d 1475.

No. 88–1860. KU *v.* ALLIED-SIGNAL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1258.

No. 88–1863. CUELLAR *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 50.

No. 88–1864. KELLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 569.

No. 88–1866. MCNABB *v.* CAVAZOS, SECRETARY OF EDUCATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 862 F. 2d 681.

No. 88–1870. BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS *v.* OPPENHEIM, APPEL, DIXON & CO. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 393.

No. 88–1871. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* BROWN. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 750 S. W. 2d 332.

No. 88–1873. BOROUGH OF EAST CONEMAUGH ET AL. *v.* EASTERN TELECOM CORP. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 30.

No. 88–1875. CATALANOTTE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 641, 532 N. E. 2d 1244.

No. 88–1880. MEEKINS, INC. *v.* LABORERS' HEALTH AND WELFARE FUND FOR SOUTHERN CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1497.

No. 88–1881. INDELICATO *v.* UNITED STATES (two cases);
No. 88–2060. SALERNO ET AL. *v.* UNITED STATES;
No. 88–2061. PERSICO ET AL. *v.* UNITED STATES; and
No. 88–2071. SCOPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: No. 88–1881 (first case), 865 F. 2d 1370; No. 88–1881 (second case) and Nos. 88–2060, 88–2061, and 88–2071, 868 F. 2d 524.

No. 88–1883. AETNA LIFE INSURANCE CO. *v.* BORGES, TREASURER OF THE STATE OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 142.

No. 88–1886. GILBERT ET AL. *v.* CITY OF LITTLE ROCK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 1062 and 1063.

No. 88–1887. HUTCHINSON *v.* MCDONALD'S CORP. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88–1890. BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. *v.* HUMANIK. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 2d 432.

No. 88–1892. OPERATING ENGINEERS PENSION TRUST ET AL. *v.* DANIEL, DBA CONSOLIDATED CONCRETE PUMPING. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 268.

No. 88–1893. KING *v.* UNITED STATES;
No. 88–7305. FOWLER *v.* UNITED STATES; and
No. 88–7310. FOWLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 656.

No. 88–1894. GIBSON ET AL. *v.* UNITED STATES ET AL.; and GIBSON *v.* WOLPERT. C. A. D. C. Cir. Certiorari denied.

No. 88–1895. SMITH ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR AUDUBON FEDERAL SAVINGS & LOAN ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88–1896. DUNTON ET AL. *v.* UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 403, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 206 Cal. App. 3d 44, 253 Cal. Rptr. 374.

No. 88–1898. REECE ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 110 Wash. 2d 766, 757 P. 2d 947.

No. 88–1900. DWORKIN *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 1188.

No. 88–1902. MAROSITZ ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 641.

No. 88–1904. WALKER TOWING CORP. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 862 F. 2d 1237.

No. 88–1906. NASH *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 675.

No. 88–1909. CSX CORP. ET AL. *v.* FOLKSTONE MARITIME, LTD., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 955.

No. 88–1910. OVERMYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 867 F. 2d 937.

No. 88–1913. SMITH ET AL. *v.* CITY OF BRENHAM, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 662.

No. 88–1914. OSBORNE *v.* STONE ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 536 So. 2d 473.

No. 88–1917. DANIELSON *v.* BANK OF AMERICA, NT & SA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–1918. LOUISIANA SOCIETY OF INDEPENDENT ACCOUNTANTS ET AL. *v.* LOUISIANA ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 533 So. 2d 1251.

No. 88–1919. CITY OF HAWTHORNE ET AL. *v.* WRIGHT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 467.

No. 88–1920. AQUARIAN FOUNDATION ET AL. *v.* LAW OFFICES OF EDWARDS & BARBIERI. Ct. App. Wash. Certiorari denied.

No. 88–1921. MORGAN *v.* WHITT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 1495.

No. 88–1922. SCHERING CORP. *v.* OPTICAL RADIATION CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 616.

No. 88–1923. CITIZENS OF ILLINOIS *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 2d 223.

No. 88–1924. LAMON ET UX. *v.* BUTLER ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 112 Wash. 2d 193, 770 P. 2d 1027.

No. 88–1926. ELDREDGE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 773 P. 2d 29.

No. 88–1927. ERICKSON *v.* CITY OF WEBSTER GROVES. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 763 S. W. 2d 278.

No. 88–1928. TYLER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 253.

No. 88–1930. MARTINEZ *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 56.

No. 88–1933. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 2d 1451.

No. 88–1936. NEWELL COS., INC. *v.* KENNEY MANUFACTURING CO. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 757.

No. 88–1939. NEW ENGLAND NEWSPAPERS, INC., DBA PAWTUCKET EVENING TIMES *v.* HEALEY. Sup. Ct. R. I. Certiorari denied. Reported below: 555 A. 2d 321.

No. 88–1940. SIGNA DEVELOPMENT CORP., FKA SIGNA INVESTMENTS, INC. *v.* FAYETTE COUNTY, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 11, 375 S. E. 2d 839.

No. 88–1944. ARZANIPOUR *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 743.

No. 88–1945. ATLAS PAPER BOX CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 2d 1487.

No. 88–1946. TEMPLIN *v.* WEISGRAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 240.

No. 88–1947. INTERTRIBAL COUNCIL OF NEVADA, INC. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 856 F. 2d 1344.

No. 88–1948. THOMAS J. LIPTON, INC., ET AL. *v.* R. C. BIGELOW, INC. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 102.

No. 88–1950. FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ET AL. *v.* SIMS ET AL.; and

No. 89–19. SIMS ET AL. *v.* FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 1449.

No. 88–1953. ATKINSON ET AL. *v.* GENERAL ELECTRIC CAPITAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 396.

No. 88–1954. STACHE *v.* INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTSMEN, AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1231.

No. 88–1955. CRABB ET AL. *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 754 S. W. 2d 742.

No. 88–1957. BARROW *v.* MARKEL, CLERK, CIRCUIT COURT OF FLORIDA, ST. JOHNS COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1275.

No. 88–1959. HELLER ET AL. *v.* ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 126 Ill. 2d 94, 533 N. E. 2d 824.

No. 88–1961. BARROW *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1275.

No. 88–1962. EAST TEXAS STEEL FACILITIES, INC. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1963. BEAZLEY *v.* MERRILL LYNCH FUTURES, INC., FKA MERRILL LYNCH COMMODITIES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1272.

No. 88–1964. POLYAK *v.* HAMILTON, JUDGE, CHANCERY AND CIRCUIT COURTS OF LAWRENCE COUNTY. Sup. Ct. Tenn. Certiorari denied.

No. 88–1965. THOMPSON ET VIR *v.* CITY OF COVINGTON ET AL. Ct. App. Ky. Certiorari denied.

No. 88–1966. ZILL *v.* AVIS RENT-A-CAR SYSTEMS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 658.

No. 88–1968. MOELLER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1446.

No. 88–1970. BURNING TREE CLUB, INC., ET AL. *v.* MARYLAND ET AL. Ct. App. Md. Certiorari denied. Reported below: 315 Md. 254, 554 A. 2d 366.

No. 88–1971. NEU *v.* CORCORAN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 662.

No. 88–1973. BARROW *v.* BALKCOM, DIRECTOR, FARMERS HOME ADMINISTRATION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1974. BARROW *v.* BISHOP, TAX COLLECTOR. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1976. BARROW *v.* UNIFINANCIAL CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1977. THE BIBLE SPEAKS, INC. *v.* DOVYDENAS. C. A. 1st Cir. Certiorari denied. Reported below: 869 F. 2d 628.

No. 88–1978. TYLER *v.* HARTFORD INSURANCE GROUP ET AL. Ct. App. Ore. Certiorari denied. Reported below: 93 Ore. App. 429, 762 P. 2d 1069.

No. 88–1979. FLEMING *v.* MOORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1257.

No. 88–1980. BARROW *v.* HILL, TAX COLLECTOR, ST. JOHNS COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1983. DAVIS ET AL. *v.* FIRST NATIONAL BANK OF WESTVILLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 868 F. 2d 206.

No. 88–1984. SAN FRANCISCO POLICE OFFICERS ASSN. ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1182.

No. 88–1985. HUDSON *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1435.

No. 88–1986. BORDEN, INC. *v.* AFFILIATED FM INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1267.

No. 88–1988. LAPIDES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 656.

No. 88–1989. CALDEIRA *v.* COUNTY OF KAUAI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 866 F. 2d 1175.

No. 88–1991. DYKENS *v.* EASTERN AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 1271.

No. 88–1992. ALCOLAC, INC. *v.* ELAM ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 765 S. W. 2d 42.

No. 88–1994. BARROW *v.* BIRD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1995. BARROW *v.* DOUGLAS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–1996. DAMINO *v.* BARRELL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 307.

No. 88–1997. DAVIS ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 122.

No. 88–1998. LAGORE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 88–1999. HARRIS ET UX. *v.* STEELWELD EQUIPMENT CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 396.

No. 88–2001. SILVER ET UX., INDIVIDUALLY AND AS PARENTS AND NEXT OF KIN OF SILVER, DECEASED MINOR CHILD *v.* FARMERS & MERCHANTS INSURANCE CO. Sup. Ct. Okla. Certiorari denied. Reported below: 770 P. 2d 878.

No. 88–2002. GILMERE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PATILLO *v.* CITY OF ATLANTA, GEORGIA,

ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 734.

No. 88–2003. ROLLINSON ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 345, 866 F. 2d 1463.

No. 88–2004. ADLER *v.* UNITED STATES; and
No. 88–7439. HELLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1336.

No. 88–2005. RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 872 F. 2d 507.

No. 88–2006. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 791.

No. 88–2007. BORDALLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 519 and 872 F. 2d 334.

No. 88–2008. RISH *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 17 Conn. App. 447, 553 A. 2d 1145.

No. 88–2010. ROY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1427.

No. 88–2011. WECHSLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 88–2012. LAMONTAGNE *v.* PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 153.

No. 88–2013. ATKINS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 135.

No. 88–2014. AUSTIN PRODUCTS CO. ET AL. *v.* WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 1552.

No. 88–2015. OLYMPIA ROOFING CO. ET AL. *v.* CELOTEX CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 771 F. 2d 888.

No. 88–2016. OLYMPIA ROOFING CO. ET AL. *v.* CELOTEX CORP. ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–2017. M/V LITSA, FKA M/V LAURIE U *v.* SOUTHEASTERN MARITIME CO. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 554.

No. 88–2020. HINDMAN *v.* CITY OF PARIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1269.

No. 88–2021. QUINONES ET AL. *v.* LEMA-MOYA, SECRETARY OF EDUCATION OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 861 F. 2d 328.

No. 88–2022. 20 ACRES OF LAND, MORE OR LESS, IN EDDY COUNTY, NEW MEXICO, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–2024. FLORES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–2025. KING *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xl, 766 P. 2d 1298.

No. 88–2026. PACYNA *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1435.

No. 88–2027. WJW–TV, INC. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 906.

No. 88–2028. THOMPSON *v.* LAPE, JUDGE, KENTON CIRCUIT COURT. Sup. Ct. Ky. Certiorari denied.

No. 88–2029. PAETZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1392.

No. 88–2030. LISA ET UX. *v.* FOURNIER MARINE CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 866 F. 2d 530.

No. 88–2032. MORLEY ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1381.

No. 88–2033. ROBERTS *v.* SUN EXPLORATION & PRODUCTION CO. C. A. 10th Cir. Certiorari denied.

No. 88–2036. CITY OF EVERETT, MASSACHUSETTS, ET AL. *v.* BORDANARO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 2d 1151.

No. 88–2037. SEWELL *v.* JEFFERSON COUNTY FISCAL COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 461.

No. 88–2038. LIVERMAN *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 88–2039. MORRIS *v.* FIRST NATIONAL BANK OF MORGANTOWN ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 88–2040. NELSON *v.* JEFFERSON COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 18.

No. 88–2042. NORTON ET AL. *v.* BRIDGES, DECEASED, ET AL. Ct. App. Wis. Certiorari denied. Reported below: 146 Wis. 2d 865, 431 N. W. 2d 327.

No. 88–2044. MISSOURI COALITION FOR THE ENVIRONMENT ET AL. *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 2d 1025.

No. 88–2045. GRIDER *v.* TEXAS OIL & GAS CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 868 F. 2d 1147.

No. 88–2046. KESSEL FOOD MARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 2d 881.

No. 88–2047. AXELSON, INC. *v.* CAMERON IRON WORKS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 2d 1278.

No. 88–2048. FARNSWORTH ET AL. *v.* CITY OF KANSAS CITY, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 2d 33.

No. 88–2049. EMPLOYERS INSURANCE OF WAUSAU, AS REPRESENTATIVE OF THOSE CERTAIN AMERICAN UNDERWRITERS SUBSCRIBING TO CERTIFICATE NO. 14880 *v.* AVONDALE SHIPYARDS, INC., ET AL.; and

No. 88–2052. OCCIDENTAL PETROLEUM CORP. ET AL. *v.* AVONDALE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 752.

No. 88–2050. CHICAGO TITLE INSURANCE CO. ET AL. *v.* TUCSON UNIFIED SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 760.

No. 88–2051. LONGVIEW FIBRE CO. *v.* JEANNETTE PAPER CO. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 148, 548 A. 2d 319.

No. 88–2053. TRAITZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 2d 368.

No. 88–2054. SMITH *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1419.

No. 88–2055. RIZZI *v.* BLUE CROSS OF SOUTHERN CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 206 Cal. App. 3d 380, 253 Cal. Rptr. 541.

No. 88–2056. DI GIAMBATTISTA *v.* SULLIVAN, FORMER JUDGE, MIDDLESEX COUNTY, MASSACHUSETTS, PROBATE COURT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1432.

No. 88–2057. HORNAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1494.

No. 88–2058. PRESIDIO VALLEY FARMERS ASSN. ET AL. *v.* SALAZAR-CALDERON ET AL.; and

No. 88–2086. SALAZAR-CALDERON ET AL. *v.* PRESIDIO VALLEY FARMERS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 384.

No. 88–2059. KAUFMAN *v.* NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1435.

No. 88–2064. DELTA AIR LINES, INC. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 181, 863 F. 2d 87.

No. 88–2065. ROMP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 88–2066. URBANIK ET UX. *v.* CITY OF BUFFALO ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 548, 533 N. Y. S. 2d 167.

No. 88–2067. LEACH *v.* JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, DBA EAST JEFFERSON GENERAL HOSPITAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 300.

No. 88–2069. TREKAS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 88–2072. MILBURN *v.* HAWKEYE BANK & TRUST N. A. OF CENTERVILLE-SEYMOUR, FKA CENTERVILLE NATIONAL BANK. Sup. Ct. Iowa. Certiorari denied. Reported below: 437 N. W. 2d 919.

No. 88–2073. MCGOWAN *v.* DEPARTMENT OF ENVIRONMENTAL QUALITY OF LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 533 So. 2d 999.

No. 88–2075. HINOJOSA *v.* CITY OF TERRELL, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 401.

No. 88–2076. SINGER ET AL. *v.* SHANNON & LUCHS CO. C. A. D. C. Cir. Certiorari denied.

No. 88–2077. HARRIS *v.* TEXAS; MURPHY *v.* TEXAS; and REED *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 762 S. W. 2d 640 (third case).

No. 88–2078. BARROW *v.* LUND ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1274.

No. 88–2080. BOKUM RESOURCES CORP. *v.* LONG ISLAND LIGHTING CO. C. A. 10th Cir. Certiorari denied.

No. 88–2081. BOONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1089.

No. 88–2082. CHRISTIANSON ET AL. *v.* COLT INDUSTRIES OPERATING CORP. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 1292.

No. 88–2083. LINCOLN HOMES, INC., ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIRST SOUTHERN SAVINGS ASSOCIATION OF JACKSON COUNTY, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 1418.

No. 88–2084. AZAR *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 539 So. 2d 1222.

No. 88–2087. NATIONAL AUTOMATIC PRODUCTS CO. *v.* AMERICAN AIRLINES, INC. (EX-CELL-O CORP., REAL PARTY IN INTEREST). Sup. Ct. Okla. Certiorari denied.

No. 88–2089. OLYMPIA ROOFING CO. ET AL. *v.* HENICAN ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 534 So. 2d 16.

No. 88–2090. WILSON ET AL. *v.* DEUKMEJIAN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–2091. ACHILLES CONSTRUCTION CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 308.

No. 88–2093. RICHARDSON ENGINEERING CO. *v.* WILLIAM L. CROW CONSTRUCTION CO. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1436.

No. 88–2094. FAGAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 64.

No. 88–2095. AXIS, S. P. A. *v.* MICAFIL, INC. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 1105.

No. 88–2096. BOLTON ET AL. *v.* TESORO PETROLEUM CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 1266.

No. 88–2097. GOODMAN, DBA SUREFIT DENTAL LAB ET AL. *v.* KENTUCKY BOARD OF DENTISTRY. Ct. App. Ky. Certiorari denied.

No. 88–2099. JUGOMETAL ENTERPRISE FOR IMPORT & EXPORT OF ORES & METALS *v.* IRVING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 383.

No. 88–2100. DUFON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88–2101. WESSENDORF *v.* SUPREME COURT OF VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 88–2103. JOHN *v.* CONNECTICUT; and
No. 89–5025. SEEBECK *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 210 Conn. 652, 557 A. 2d 93.

No. 88–2104. MEDICS PHARMACEUTICAL CORP. *v.* NEWMAN. Ct. App. Ga. Certiorari denied. Reported below: 190 Ga. App. 197, 378 S. E. 2d 487.

No. 88–2105. DURKIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 1271.

No. 88–2106. ROSENBERG *v.* COMERICA BANK. C. A. 6th Cir. Certiorari denied.

No. 88–2108. SIMAY ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 268.

No. 88–2110. CITY OF MACON, GEORGIA *v.* PASCO BUILDING SYSTEMS ET AL. Ct. App. Ga. Certiorari denied. Reported below: 191 Ga. App. 48, 380 S. E. 2d 718.

No. 88–2111. STICH *v.* JENSEN, JUDGE, SUPERIOR COURT OF SOLANO COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 430.

No. 88–2113. JOHNSON *v.* WILLIAMS-EL. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 224.

No. 88–2114. BURKE *v.* CITY OF BOSTON ET AL. App. Ct. Mass. Certiorari denied. Reported below: 26 Mass. App. 1124, 534 N. E. 2d 311.

No. 88–2115. LEVITIN *v.* POMIRCHY ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 144 App. Div. 2d 655, 535 N. Y. S. 2d 543.

No. 88–2116. JOHNSON *v.* JOHNSON ET AL. Ct. App. Mich. Certiorari denied.

No. 88–2118. SOLOMON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 415.

No. 88–2119. MEYER ET AL. *v.* BARNES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 464.

No. 88–2120. MERRILL ET AL. *v.* AUGUST. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–2121. FASSLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 864 F. 2d 790.

No. 88–2124. DELEON ET UX. *v.* ST. JOSEPH HOSPITAL, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 871 F. 2d 1229.

No. 88–2125. MCDONALD, TRUSTEE OF LOYER EDUCATIONAL TRUST *v.* WAYNE COUNTY ROAD COMMISSION ET AL. Ct. App. Mich. Certiorari denied. Reported below: 168 Mich. App. 587, 425 N. W. 2d 189.

No. 88–2126. COLLINS ET AL. *v.* LAFLEUR; and
No. 89–164. BO-MICK CONSTRUCTION CO., INC. *v.* LAFLEUR. Sup. Ct. La. Certiorari denied. Reported below: 540 So. 2d 323.

No. 88–2127. VAHLSING *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 557 A. 2d 946.

No. 88–2128. DAVIS ET AL. *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 922.

No. 88–2131. GEORGIA *v.* SMITH. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 135, 377 S. E. 2d 158.

No. 88–2132. LOCAL UNION NO. 5741, UNITED MINE WORKERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 733.

No. 88–2135. AVINGER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 88–2136. BARROW *v.* REED ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–2138. GRAY, FKA HEFFRON *v.* ROTH, FIDUCIARY OF THE ESTATE OF HEFFRON. Ct. App. Iowa. Certiorari denied. Reported below: 438 N. W. 2d 25.

No. 88-2139. MANVILLE SALES CORP. *v.* A. T. & T. TECHNOLOGIES, INC. Super. Ct. Pa. Certiorari denied. Reported below: 384 Pa. Super. 650, 551 A. 2d 600.

No. 88-2140. HANCOCK *v.* CITY OF DAVENPORT ET AL. Ct. App. Iowa. Certiorari denied. Reported below: 442 N. W. 2d 279.

No. 88-2141. TODA *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88-6821. THOMAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 40 Ohio St. 3d 213, 533 N. E. 2d 286.

No. 88-6834. DANIELS *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1267.

No. 88-6845. WARMSLEY *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 88-6850. STREETER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88-6856. QUINTERO *v.* TEXAS; and BLANTON *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 761 S. W. 2d 438 (first case).

No. 88-6872. FRAZIER *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 588.

No. 88-6895. HEIGHTLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 94.

No. 88-6898. ANTONELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 613.

No. 88-6909. WALLS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 552 A. 2d 858.

No. 88-6911. ORTIZ-BALCAZAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1429.

No. 88-6914. MITCHELL *v.* CALIFORNIA (two cases). App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 88–6936. HOWARD *v.* BANGS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 870.

No. 88–6960. OWEN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 538 So. 2d 1269.

No. 88–6970. PROWS *v.* BLACK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 873.

No. 88–6976. WOOLWORTH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 542 So. 2d 1335.

No. 88–6978. CONNELL *v.* WADE, SUPERINTENDENT, HENDRY CORRECTIONAL INSTITUTION AT IMMAKOLEE, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 538 So. 2d 854.

No. 88–6980. BROWN ET AL. *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1422.

No. 88–7020. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 486.

No. 88–7029. WEEKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 267.

No. 88–7044. LARA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 740 S. W. 2d 823.

No. 88–7048. CASTILLO *v.* BOWLES ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–7050. KALLIEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–7089. ROBERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 260.

No. 88–7101. JIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 211.

No. 88–7104. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 432.

No. 88–7109. ROUSE *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 442 N. W. 2d 279.

No. 88–7118. SULIE *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 1348.

No. 88–7119. MRAMOR *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1268.

No. 88–7137. JACK *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1263.

No. 88–7139. STUTZMAN *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 171 Ill. App. 3d 670, 525 N. E. 2d 903.

No. 88–7145. MORISSETTE *v.* BROWN. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 659.

No. 88–7158. SELBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 414.

No. 88–7160. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 866 F. 2d 268.

No. 88–7190. FERENC *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1301.

No. 88–7204. KERKMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 2d 877.

No. 88–7212. EMOND *v.* UNITED STATES;
No. 88–7316. GORMAN *v.* UNITED STATES;
No. 88–7373. STELTEN *v.* UNITED STATES;
No. 88–7393. HAWLEY *v.* UNITED STATES; and
No. 88–7544. HAWLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 446.

No. 88–7214. SILVAGGIO *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–7218. CORREA *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1500.

No. 88–7224. GRAY *v.* EDWARDS, SUPERINTENDENT, HALIFAX CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1257.

No. 88–7226. ARMENIA *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1370.

No. 88–7227. KINSLOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 963.

No. 88–7228. HOLGUIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 801 and 868 F. 2d 201.

No. 88–7229. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1447.

No. 88–7231. HILL *v.* MARTIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–7234. LASTER *v.* STAR RENTAL, INC. Ct. App. Ga. Certiorari denied. Reported below: 190 Ga. App. 1, 378 S. E. 2d 320.

No. 88–7236. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 877.

No. 88–7239. CLARK *v.* YLST, SUPERINTENDENT, CALIFORNIA MEDICAL FACILITY. C. A. 9th Cir. Certiorari denied.

No. 88–7241. CARR *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 554 A. 2d 778.

No. 88–7244. FAFOWORA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 275 U. S. App. D. C. 141, 865 F. 2d 360, and 279 U. S. App. D. C. 373, 881 F. 2d 1088.

No. 88–7245. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 3d 576, 764 P. 2d 1087.

No. 88–7250. HOWARD *v.* CASSIDY ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–7251. JONES *v.* SUPREME COURT OF ALABAMA. Sup. Ct. Ala. Certiorari denied.

No. 88-7252. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 600.

No. 88-7254. MORALES *v.* PAN AMERICAN WORLD AIRWAYS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 881.

No. 88-7257. BREEST *v.* CUNNINGHAM, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1432.

No. 88-7259. COCHRAN *v.* BUTTS ET AL. C. A. 8th Cir. Certiorari denied.

No. 88-7261. LECHIARA *v.* GASKINS ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 88-7262. HOLMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 4.

No. 88-7263. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 88-7266. GARCIA-PATRON ET AL. *v.* UNITED STATES; and No. 88-7442. TAYLOR-WALTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 367.

No. 88-7271. SAVERS *v.* BAKER, SECRETARY OF STATE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 265.

No. 88-7274. ALSTON *v.* EDWARDS. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 1408.

No. 88-7276. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 88-7277. WELCH *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-7278. DEVINE *v.* HERALD-MAIL CO. Ct. Sp. App. Md. Certiorari denied. Reported below: 78 Md. App. 708.

No. 88-7279. FIELDS *v.* DANAHY ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-7282. WARMSLEY *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 88–7283. SHAFFER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1436.

No. 88–7284. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 1310.

No. 88–7285. BARTS *v.* JOYNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 865 F. 2d 1187.

No. 88–7286. BROWN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 865 F. 2d 269.

No. 88–7287. GRIFFIN *v.* STUTLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 194.

No. 88–7290. METOYER *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 88–7291. THOMAS *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–7292. NEGRON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 636, 539 N. E. 2d 1110.

No. 88–7297. GREEN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 176.

No. 88–7298. JACKSON ET AL. *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1426.

No. 88–7302. LUCARELLI *v.* SINICROPI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 1435.

No. 88–7303. SOTO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 2d 200.

No. 88–7304. SULLIVAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 88–7308. CRANE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 88–7311. DORSEY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 163.

No. 88–7312. SMITH *v.* BUTLER, WARDEN, ET AL. 5th Jud. Dist. Ct. La., Richland Parish. Certiorari denied.

No. 88–7319. JIMENEZ *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., San Mateo County. Certiorari denied.

No. 88–7323. ROSBERG *v.* EISENBEISS. C. A. 8th Cir. Certiorari denied.

No. 88–7325. TURNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88–7327. CVIKICK *v.* RAILROAD RETIREMENT BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 103.

No. 88–7329. GOLMON *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 536 So. 2d 481.

No. 88–7333. ELAM *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 108 N. M. 268, 771 P. 2d 597.

No. 88–7334. COX *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 200.

No. 88–7337. ROMERO-LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 872 F. 2d 1073.

No. 88–7338. VAN DAAM *v.* CONNELL ET AL. Sup. Ct. R. I. Certiorari denied.

No. 88–7340. GAWLOSKI *v.* DALLMAN, SUPERINTENDENT, LEBANON CORRECTIONAL INSTITUTION, ET AL. C. A. 6th Cir. Certiorari denied.

No. 88–7341. BELANGER *v.* ALESSI. Sup. Ct. La. Certiorari denied. Reported below: 538 So. 2d 596.

No. 88–7344. CORBIT *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 88–7349. WILLIAMSON *v.* NORTHEAST REGIONAL POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 415.

No. 88–7350. SCHMID *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1447.

No. 88–7352. HARDEN ET UX. *v.* FEDERAL LAND BANK OF OMAHA. Ct. App. Iowa. Certiorari denied. Reported below: 442 N. W. 2d 279.

No. 88–7353. BROOKS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 88–7359. GIBSON *v.* TURNER, SUPERINTENDENT, RENZ CORRECTIONAL CENTER AT CEDAR CITY, MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 88–7360. HARRIS *v.* CITY OF COLUMBIA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1090.

No. 88–7361. ALSTON *v.* GLUCH, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–7362. MCDONALD *v.* YELLOW CAB METRO, INC. Sup. Ct. Tenn. Certiorari denied.

No. 88–7363. STELLJES *v.* SLOPER. Sup. Ct. Ore. Certiorari denied.

No. 88–7364. MARTINEZ *v.* NEW MEXICO ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 108 N. M. 382, 772 P. 2d 1305.

No. 88–7366. HOOPER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1423.

No. 88–7367. GREGOR *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1172, 549 N. E. 2d 360.

No. 88–7368. GETTY *v.* WEBSTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 861.

No. 88–7370. MONTEIRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 2d 204.

No. 88–7372. ZATKO *v.* BUNNELL, SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 88–7375. CADENA-SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 88–7377. YANG *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 887.

No. 88–7378. WILLIAMS *v.* SHEFFIELD, SUPERINTENDENT, DADE CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 872.

No. 88–7379. MCNAIR *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 399.

No. 88–7382. CRUZ *v.* GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 101.

No. 88–7383. BRACK-BRACK *v.* UNITED STATES;
No. 88–7385. TELLEZ-MOLINA *v.* UNITED STATES;
No. 88–7386. DIAZ-ZABALETA *v.* UNITED STATES;
No. 88–7391. AURELA-ZUNIGA *v.* UNITED STATES; and
No. 88–7397. MENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 1522.

No. 88–7395. BROADNAX *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 177 Ill. App. 3d 818, 532 N. E. 2d 936.

No. 88–7400. MARIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 88–7402. LAWSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 179.

No. 88–7403. ALEXANDRAPOLOUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 88–7405. KARRAS *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 438 N. W. 2d 213.

No. 88–7406. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 128.

No. 88–7407. MONTOYA *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS; and MONTOYA *v.* UNION PACIFIC RAILROAD CO. C. A. 10th Cir. Certiorari denied.

No. 88–7411. WRIGHT *v.* WASHINGTON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1443.

No. 88–7412. MOODY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1443.

No. 88–7414. WRIGHT *v.* JOHNSON. C. A. 2d Cir. Certiorari denied.

No. 88–7415. RASHEED-BEY *v.* DUCKWORTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 424.

No. 88–7416. KENDRICK *v.* CLEMENTS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 422.

No. 88–7417. KALTENBACH *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 88–7418. KELLY *v.* HINES-RINALDI FUNERAL HOME, INC. C. A. 4th Cir. Certiorari denied. Reported below: 847 F. 2d 147.

No. 88–7419. JEMISON *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88–7420. RAUSER *v.* FREEMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–7421. CARTER *v.* SPARKS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1430.

No. 88–7422. NORRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 262, 873 F. 2d 1519.

No. 88–7423. NORD *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 88–7425. MONTGOMERY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 367, 531 N. E. 2d 177.

No. 88–7426. CHILDS *v.* JONES, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 118.

No. 88–7428. GLADSON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 88–7429. ASCH *v.* PHILIPS, APPEL & WALDEN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 776.

No. 88–7430. ABDUL-AKBAR *v.* DURSTEIN. Sup. Ct. Del. Certiorari denied. Reported below: 561 A. 2d 992.

No. 88–7431. HENDERSON *v.* MCCAUGHTRY, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied.

No. 88–7433. GROFF *v.* BUCKWALTER. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 310.

No. 88–7434. MAGEE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–7436. FLETCHER *v.* CRABTREE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1025.

No. 88–7437. BECKFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 873.

No. 88–7441. KING *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88–7443. MOSKOVITS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 312.

No. 88–7445. WILLARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–7448. THOMAS *v.* GOYETTE. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1493.

No. 88–7449. FISCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 88–7450. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 295.

No. 88–7452. ANDERSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 542 So. 2d 292.

No. 88–7453. ATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 94.

No. 88–7454. ECHOLS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 88–7455. DOLENC *v.* MUNICIPALITY OF MOUNT LEBANON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 651.

No. 88–7456. ABRAMSON *v.* BALLOU. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 416.

No. 88–7457. DOLENC *v.* COVILLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 310.

No. 88–7462. HARRISON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 88–7463. VALIANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 205.

No. 88–7464. UNDERWOOD *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 88–7470. WALLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 118.

No. 88–7471. ROSADO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 967.

No. 88–7472. AHUMADA-AVALOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 681.

No. 88–7473. RIVERA-RAMOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 856 F. 2d 420.

No. 88–7474. COOPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 269.

No. 88–7475. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 614.

No. 88–7476. ALSTON *v.* GLUCH, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–7478. DALGLISH *v.* GOLDSMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 612.

No. 88–7479. LUNA *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–7481. HADLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 88–7482. JOHNSON *v.* PENNSYLVANIA WIRE & ROPE CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 608.

No. 88–7483. GREGOR ET UX. *v.* BELL FEDERAL SAVINGS & LOAN ASSN. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 171 Ill. App. 3d 1162, 543 N. E. 2d 623.

No. 88–7484. GREGOR *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 175 Ill. App. 3d 1162, 549 N. E. 2d 34.

No. 88–7485. BEAN *v.* COHN, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 424.

No. 88–7486. CARLTON *v.* BERG. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1024.

No. 88–7489. NICKENS *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 88–7490. HOLLOWAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88–7491. VAN LEEUWEN ET VIR *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 868 F. 2d 300.

No. 88–7493. VARGAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 819.

No. 88–7496. DONNELL *v.* GENERAL MOTORS CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1445.

No. 88–7497. KOLTERYHAN *v.* TRUMBULL COUNTY CHILDREN SERVICES BOARD. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 88–7498. BORDELON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 491.

No. 88–7499. MARTINEZ-FLORES *v.* UNITED STATES; and No. 88–7512. DEERING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 830.

No. 88–7500. FRANK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1177.

No. 88–7501. TILLMAN *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–7502. PENDLETON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1499.

No. 88–7504. FORGEY ET UX. *v.* BACA STATE BANK ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–7505. HANAGAN *v.* ESTATE OF HANAGAN ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 174 Ill. App. 3d 1159, 548 N. E. 2d 1166.

No. 88–7506. HARDIN *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1447.

No. 88–7507. STONER *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1029.

No. 88–7508. WADE *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1486.

No. 88–7510. BERRYHILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 88–7513. PACE *v.* CITY OF BIRMINGHAM, ALABAMA. Cir. Ct. Ala., Jefferson County. Certiorari denied.

No. 88–7514. HARNAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 119.

No. 88–7515. GEORGE *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–7516. LACKLAND *v.* MONTGOMERY WARD DEPARTMENT STORE ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–7517. TRZASKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1118.

No. 88–7518. BROWN *v.* THOMAS, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–7519. ALSTON *v.* GLUCH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 88–7521. THOMAS *v.* MOORE, SHERIFF, PONTOTOC COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 866 F. 2d 803.

No. 88–7522. ERICKSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–7523. FLOYD *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 88–7524. COVOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 805.

No. 88–7525. BLANTON *v.* UNITED STATES; and
No. 88–7536. BROADWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 870 F. 2d 594.

No. 88–7526. MEYERS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 308.

No. 88–7527. RASHEED *v.* BENDER, SUPERINTENDENT, NORTH CENTRAL CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1432.

No. 88–7528. MACEO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1.

No. 88–7529. BRUNO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 873 F. 2d 555.

No. 88–7531. JOHNS *v.* O'BRIEN, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–7532. CROWE *v.* THOMPSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1257.

No. 88–7534. RANKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 414.

No. 88–7537. THOMAS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 237 Va. xi, 379 S. E. 2d 134.

No. 88–7538. PRUITT ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 2d 1145.

No. 88–7539. ZANI *v.* ONION, JUDGE. C. A. 5th Cir. Certiorari denied.

No. 88–7540. TAYLOR *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 162.

No. 88–7541. JOSEPH *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 759 S. W. 2d 770.

No. 88–7542. CORREA *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 88–7543. JOHNSON *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 748 S. W. 2d 562.

No. 88–7546. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–7547. RAMIREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 582.

No. 88–7550. JETT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 145 App. Div. 2d 1000, 536 N. Y. S. 2d 362.

No. 88–7551. TRANBY *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 437 N. W. 2d 817.

No. 88–7552. TAPLETTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 101.

No. 88–7553. GRIMALDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 88–7554. KANE *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1421.

No. 88–7556. STEELE *v.* MARYLAND BANK, N. A. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 651.

No. 88–7558. MERRITT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 872.

No. 88–7559. HANSARD *v.* PEPSI-COLA METROPOLITAN BOTTLING CO., INC., DBA PEPSI-COLA BOTTLING GROUP; and
No. 89–208. PEPSI-COLA METROPOLITAN BOTTLING CO., INC., DBA PEPSI-COLA BOTTLING GROUP *v.* HANSARD. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1461.

No. 88–7560. LADD *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 108.

No. 88–7561. NELSON *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–7563. SPYCHALA *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 430.

No. 88–7565. ALONSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 296.

No. 88–7568. MACOMBER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 244 Kan. 396, 769 P. 2d 621.

No. 88–7569. LEPISCOPO *v.* BLACKHURST ET AL. Sup. Ct. N. M. Certiorari denied.

No. 88–7570. SHARP, BY NEXT FRIEND, SHARP *v.* DOWD, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 88–7571. HOYOS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1421.

No. 88–7572. BROWNSCOMBE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 871 F. 2d 1097.

No. 88–7573. FELTON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–7574. HURST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1087.

No. 88–7575. GARCIA *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–7576. CHRISTIAN, AKA CHRISTIANSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 861 F. 2d 195.

No. 88–7577. HORTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–7578. HEARNE *v.* MCKENZIE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 848 F. 2d 191.

No. 88–7579. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 412.

No. 88–7580. MCDONALD *v.* JOHNSON. Sup. Ct. Tenn. Certiorari denied.

No. 88–7581. WILSON *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 105.

No. 88–7582. HARLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–7584. HAYES *v.* MADISON HOUSING AUTHORITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 417.

No. 88–7585. DEMIDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 88–7587. GRIFFITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 872.

No. 88–7588. BROWN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–7589. SIMMS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 211 Conn. 1, 557 A. 2d 914.

No. 88–7591. SIVLEY *v.* JOHNS HOPKINS UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–7592. TITCOMB *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 780.

No. 88–7594. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 60.

No. 88–7596. SANDERS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 88–7597. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1494.

No. 88–7600. SADLER, GUARDIAN AD LITEM OF SADLER ET AL., MINORS *v.* RAINIER BANK OREGON, N. A., ET AL. Sup. Ct. Mont. Certiorari denied.

No. 88–7601. PROWS *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1427.

No. 88–7602. MAY *v.* GRAY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1491.

No. 88–7603. HOOPER *v.* DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS. C. A. D. C. Cir. Certiorari denied.

No. 88–7604. LARSEN *v.* LARSEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 871 F. 2d 1095.

No. 88–7605. BOLDEN *v.* FORD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 434.

No. 88–7606. CURRY *v.* HADEN. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 416.

No. 88–7608. THOMAS *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 814.

No. 88–7609. MATHEWS *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–7610. MOKONE *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 413.

No. 88–7612. KARAAGAC *v.* DISTRICT OF COLUMBIA BOARD OF MEDICINE. Ct. App. D. C. Certiorari denied.

No. 88–7613. CALDERON-ABEJA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 1222.

No. 88–7614. KASWAN *v.* VETERANS ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 856.

No. 88–7617. STOVACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 88–7618. D. M. *v.* DEPARTMENT OF HUMAN SERVICES. Ct. App. Iowa. Certiorari denied. Reported below: 442 N. W. 2d 280.

No. 88–7621. MARQUEZ-PENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 88–7622. MCDONALD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 88–7623. MOORE *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 88–7624. BOSSERT *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 772 P. 2d 618.

No. 88–7627. NELSON *v.* INGRAM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1027.

No. 88–7628. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 2d 371.

No. 88–7630. GREGORY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 237 Va. 354, 377 S. E. 2d 405.

No. 88–7631. CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 230.

No. 88–7632. KALMS *v.* UNITED STATES; and
No. 89–5212. KALMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 89–1. KITSOS *v.* O'MALLEY, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Certiorari denied. Reported below: 127 Ill. 2d 1, 535 N. E. 2d 792.

No. 89–2. CAMOSCIO *v.* TIERNEY, ADMINISTRATIVE JUSTICE, BOSTON MUNICIPAL COURT DEPARTMENT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–3. SYNERGY GAS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 856.

No. 89–4. ALASKA PACIFIC INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 426.

No. 89–5. ELLENBERG, TRUSTEE IN BANKRUPTCY FOR RODGER & RODGER, INC. *v.* T & B SCOTTDALE CONTRACTORS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1372.

No. 89–6. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1500.

No. 89–7. JOSEPH *v.* UNITED STATES;
No. 89–5044. KNIGHT *v.* UNITED STATES; and
No. 89–5058. WASHINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1285.

No. 89–8. ARNOLD ET AL. *v.* POSTMASTER GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 305, 863 F. 2d 994.

No. 89–9. DEROBURT *v.* GANNETT CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 714.

No. 89–10. COSGROVE *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 439 N. W. 2d 119.

No. 89–11. DURKAN *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 2d 1451.

No. 89–13. OREGON PHYSICIAN'S SERVICE *v.* HAHN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 2d 1022.

No. 89–14. WARD *v.* UNITED STATES POSTAL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 415.

No. 89–15. MUNOZ-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 814.

No. 89–16. BINGHAM TOYOTA, INC., ET AL. *v.* VIZZOLINI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 109.

No. 89–18. WINER *v.* NIXON. Sup. Ct. Va. Certiorari denied.

No. 89–20. STERLING ELECTRIC, INC. *v.* PARTS & ELECTRIC MOTORS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 866 F. 2d 228.

No. 89–21. FRAUM *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 817.

No. 89–22. KNAPP ET AL. *v.* PALOS COMMUNITY HOSPITAL ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1012, 531 N. E. 2d 989.

No. 89–23. SMITH *v.* CLEBURNE COUNTY HOSPITAL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 2d 1375.

No. 89–25. SPINDLE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 35.

No. 89–26. HUBBARD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 27.

No. 89–27. MUHAMMED *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 27 Ark. App. 188, 769 S. W. 2d 33.

No. 89–28. LEE ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 27 Ark. App. 198, 770 S. W. 2d 148.

No. 89–32. HAYES ET UX. *v.* TOWN OF ORLEANS. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1433.

No. 89–35. SUAREZ CORP. *v.* UNITED STATES POSTAL SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1493.

No. 89–36. MULLEN *v.* LAND PARCEL LIQUIDATORS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 89–37. TRUSTEES OF IRON WORKERS LOCAL 473 PENSION TRUST *v.* ALLIED PRODUCTS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 208.

No. 89–41. MONAGLE *v.* FRANK, POSTMASTER GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89–42. MANAGEMENT RECRUITERS INTERNATIONAL, INC., ET AL. *v.* SWENSON. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 2d 1304 and 872 F. 2d 264.

No. 89–49. STICH *v.* BUNTING, JUDGE, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–50. HARDEMAN *v.* CHRYSLER CREDIT CORP. Ct. App. Ohio, Butler County. Certiorari denied. Reported below: 56 Ohio App. 3d 142, 565 N. E. 2d 849.

No. 89–51. HOHE ET AL. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 868 F. 2d 69.

No. 89–54. NCR CORP. *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 438 N. W. 2d 86.

No. 89–55. PETTYJOHN *v.* KALAMAZOO CENTER CORP., DBA KALAMAZOO HILTON INN. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 2d 879.

No. 89–57. PICCIOLO ET AL. *v.* JONES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 534 So. 2d 875.

No. 89–58. WALTHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1334.

No. 89–60. BLOSENSKI DISPOSAL SERVICE *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES. Pa. Commw. Ct. Certiorari denied. Reported below: 116 Pa. Commw. 315, 543 A. 2d 159.

No. 89–63. COHN ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 533.

No. 89–64. CHARLES WOODS TELEVISION CORP. *v.* CAPITAL CITIES/ABC, INC. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1155.

No. 89–66. LINDSTROM ET AL. *v.* ALLEN ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 237 Va. 489, 379 S. E. 2d 450.

No. 89–69. LOVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 867 F. 2d 209.

No. 89–70. KUEHN *v.* COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, ET AL. Ct. App. Minn. Certiorari denied. Reported below: 435 N. W. 2d 130.

No. 89–71. ZALDIVAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1343.

No. 89–76. PATNER *v.* COUNTY OF LAKE. C. A. 7th Cir. Certiorari denied. Reported below: 871 F. 2d 58.

No. 89–80. KATZ ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 520 Pa. 451, 554 A. 2d 896.

No. 89–83. FLEMING *v.* MARTIN ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–84. FLEMING *v.* ANDERSON. C. A. 10th Cir. Certiorari denied.

No. 89–85. FLEMING ET UX. *v.* ROTHENBERG ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–86. FLEMING ET UX. *v.* RHODES ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–88. WOODWARD *v.* STATE BAR OF GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 229, 378 S. E. 2d 110.

No. 89–89. EVANS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 190 Ga. App. 856, 380 S. E. 2d 332.

No. 89–91. ANDERSON ET UX. *v.* PARCOM, INC. Sup. Ct. Va. Certiorari denied.

No. 89–93. ZOMBRO *v.* BALTIMORE CITY POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 868 F. 2d 1364.

No. 89–94. WITTERS *v.* WASHINGTON DEPARTMENT OF SERVICES FOR THE BLIND. Sup. Ct. Wash. Certiorari denied.* Reported below: 112 Wash. 2d 363, 771 P. 2d 1119.

No. 89–96. MILBURN, A MINOR, BY MILBURN, HIS FATHER AND NEXT FRIEND *v.* ANNE ARUNDEL COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 871 F. 2d 474.

No. 89–97. MIRRER *v.* SMYLEY, COMMISSIONER OF PROBATION. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 890.

No. 89–99. MARJEC, INC. *v.* HOME & LOT OWNERS ASSOCIATION OF SHAWNEE-LAND, INC. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 594.

No. 89–100. NEW JERSEY TRANSIT RAIL OPERATIONS, INC. *v.* FITCHIK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 2d 655.

No. 89–102. RIVERA DE FELICIANO ET AL. *v.* FARM CREDIT CORPORATION. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 447.

No. 89–104. WOODFIELD *v.* RULE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 432.

No. 89–105. ROBINSON *v.* QUICK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 867.

No. 89–106. POSS, INDIVIDUALLY AND AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF POSS, ET UX. *v.* AZAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89–108. KEHOE ET AL. *v.* DOBOS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 404 Mass. 634, 537 N. E. 2d 558.

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*[REPORTER'S NOTE: For a statement of JUSTICE WHITE'S views on this case, see his separate dissenting opinion in *McMonagle* v. *Northeast Women's Center, Inc.*, *post*, p. 901.]

No. 89–109. MEAD EMBALLAGE, S. A. *v.* BERNSTEIN. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 541 So. 2d 794.

No. 89–110. ENGLERT, DBA NORTHEAST ELECTRICAL INSPECTION AGENCY *v.* CITY OF MCKEESPORT, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 1144.

No. 89–111. DEERE & CO. *v.* HENSGENS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 879.

No. 89–115. SCHEXNIDER ET UX. *v.* MCDERMOTT INTERNATIONAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 717.

No. 89–116. GRONQUIST, DBA GRONK'S DONUT & SANDWICH SHOP *v.* BOULDER URBAN RENEWAL AUTHORITY ET AL. Ct. App. Colo. Certiorari denied.

No. 89–117. SPEERS *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 17 Conn. App. 587, 554 A. 2d 769.

No. 89–119. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 891.

No. 89–121. PREVENSLIK, INDIVIDUALLY AND AS TRUSTEE OF THE FELIX AND OLGA DAVIS TRUST *v.* ROSSKO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 57.

No. 89–124. UNITED AIR LINES, INC., ET AL. *v.* BOARD OF ASSESSMENT APPEALS OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 773 P. 2d 1033.

No. 89–125. BUNCH *v.* HELM, ADMINISTRATOR OF THE ESTATE OF HELM. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1490.

No. 89–126. ADAMS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 926.

No. 89–128. NORTHEN, TRUSTEE IN BANKRUPTCY FOR GORDON FOODS, INC. *v.* QUINN WHOLESALE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 77.

No. 89–129. GOLDBERG *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 315 Md. 653, 556 A. 2d 267.

No. 89–130. FLOWERS *v.* CITY OF COLLEGE STATION, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 89–131. STORIE, SHERIFF OF THURSTON COUNTY, NEBRASKA, ET AL. *v.* DUNCAN. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1100.

No. 89–132. VACCARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 432.

No. 89–133. ERLANDSON ET AL. *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 763 S. W. 2d 845.

No. 89–135. HOLROYD *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 89–136. HARNEY & MOORE ET AL. *v.* FINEBERG. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 207 Cal. App. 3d 1049, 255 Cal. Rptr. 299.

No. 89–137. LOWRY *v.* BANKERS LIFE & CASUALTY RETIREMENT PLAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 692 and 871 F. 2d 522.

No. 89–138. REINIG *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 2d 971, 537 N. Y. S. 2d 709.

No. 89–139. HOLMES *v.* HOLMES. Sup. Ct. Va. Certiorari denied.

No. 89–140. RAJPUT *v.* RAJPUT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–141. MULLEN *v.* GALATI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–145. TEXAS FRUIT PALACE, INC. *v.* STEGER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–146. PRODUCTION MACHINERY CORP. *v.* TANGO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 89–147. DIXIE BROADCASTING, INC., ET AL. *v.* RADIO WBHP, INC. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 1023.

No. 89–148. SUZUKI MOTOR CO., LTD., ET AL. *v.* RICHARDSON. C. A. Fed. Cir. Certiorari denied. Reported below: 868 F. 2d 1226.

No. 89–149. EVERPURE, INC. *v.* CUNO, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 875 F. 2d 300.

No. 89–150. MONROE SYSTEMS FOR BUSINESS, INC. *v.* BROOKS. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 202.

No. 89–154. HARDING *v.* COUNTY OF DOOR, WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 430.

No. 89–158. BENSON *v.* HOFFPAUIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 422.

No. 89–159. JOHNSON *v.* PARK SHORE MARINA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1026.

No. 89–160. O'CONNOR *v.* MULLIGAN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–161. RICH'S BETTER GREASE SERVICE, INC. *v.* VENTURINO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89–162. EXNER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1257.

No. 89–165. BOYD *v.* BLACK ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–167. INSURANCE CORPORATION OF AMERICA *v.* DARST, INSURANCE COMMISSIONER OF WEST VIRGINIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 55.

No. 89–172. COMMERCIAL CREDIT EQUIPMENT CORP. *v.* STAMPS. C. A. 7th Cir. Certiorari denied.

No. 89–173. WEIL CERAMICS & GLASS, INC. *v.* DASH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 878 F. 2d 659.

No. 89–174. ROSS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (STITES ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–178. SNOW ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–181. RODRIGUEZ, INDIVIDUALLY AND AS NEXT FRIEND OF TORRES, ET AL. *v.* CITY OF BROWNSVILLE. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 552.

No. 89–182. GRYNBERG ET AL. *v.* DANZIG ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–183. SYRE *v.* WILLIQUETTE, SHERIFF, VILAS COUNTY, WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 149 Wis. 2d 764, 441 N. W. 2d 756.

No. 89–184. J. WILLIAM COSTELLO PROFIT SHARING TRUST *v.* STATE ROADS COMMISSION OF THE MARYLAND HIGHWAY ADMINISTRATION. Ct. App. Md. Certiorari denied. Reported below: 315 Md. 693, 556 A. 2d 1102.

No. 89–185. CONNOR *v.* SACHS ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–188. COLORADO INTERSTATE GAS CO. *v.* OKLAHOMA TAX COMMISSION. Sup. Ct. Okla. Certiorari denied. Reported below: 774 P. 2d 468.

No. 89–190. AMERICAN TRANSIT CORP. ET AL. *v.* APONTE CARATINI. Sup. Ct. P. R. Certiorari denied.

No. 89–192. ORBEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 172.

No. 89–197. ELECTRO-NUCLEONICS, INC. *v.* WASHINGTON SUBURBAN SANITARY COMMISSION. Ct. App. Md. Certiorari denied. Reported below: 315 Md. 361, 554 A. 2d 804.

No. 89–202. GEORGE D. NEWMAN & SONS, INC. *v.* WASHINGTON SUBURBAN SANITARY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1438.

No. 89–203. SIEGEL *v.* EDMONDS CO., INC., PROFIT SHARING PLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 859.

No. 89-209. BURRIS *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1445.

No. 89-210. AMOS ET UX. *v.* BLUE CROSS BLUE SHIELD OF ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 430.

No. 89-214. EARTH *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 1033.

No. 89-215. APARO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 89-218. LEONARD *v.* TOWN OF HERNDON, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89-221. HEARN ET UX. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1498.

No. 89-226. TOLLIVER ET AL. *v.* ODOM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 304.

No. 89-230. KALVANS *v.* SAMARITAN HEALTH CENTER. Ct. App. Mich. Certiorari denied.

No. 89-239. DOYLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 89-249. KENNA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89-251. EPIC METALS CORP. *v.* H. H. ROBERTSON CO. C. A. Fed. Cir. Certiorari denied. Reported below: 870 F. 2d 1574.

No. 89-253. PINKHAM *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 556 A. 2d 658.

No. 89-262. BORUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 316.

No. 89-277. EVERETT *v.* SECRETARY OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 417.

No. 89-285. DELANEY *v.* GIBBS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1445.

No. 89–289. GEORGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 63.

No. 89–304. JOHNSON *v.* MONTGOMERY WARD & CO., INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 175 Ill. App. 3d 1157, 549 N. E. 2d 32.

No. 89–5001. WALKER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 527 N. E. 2d 706.

No. 89–5003. CUEVAS-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 814.

No. 89–5004. ZABARE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 2d 282.

No. 89–5007. MUNGUIA *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 517.

No. 89–5009. TOUMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89–5010. HOLMES *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 89–5012. STURM *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–5013. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 922.

No. 89–5014. MAY *v.* WARNER AMEX CABLE COMMUNICATIONS (two cases). C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 259.

No. 89–5015. MAY *v.* BERTELSMAN ET AL. (three cases). C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 259.

No. 89–5017. VAN DOREN *v.* STATE BAR OF TEXAS ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 89–5018. BUCHANAN *v.* REYNOLDS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–5020. GRIFFIN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1025.

No. 89–5022. GLASPER *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–5023. JONES *v.* TAYLOR, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 89–5024. CURTIS, FKA BAKER *v.* BAKER. Sup. Ct. Iowa. Certiorari denied.

No. 89–5026. FANNY *v.* ENGLEMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 54.

No. 89–5027. MCDONALD *v.* METROPOLITAN GOVERNMENT FOR NASHVILLE AND DAVIDSON COUNTY ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 89–5028. MAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89–5029. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 317.

No. 89–5031. LAWSON *v.* TANEDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1026.

No. 89–5033. GALVAN-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 638.

No. 89–5034. CAMPER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 2d 1307.

No. 89–5035. LUCAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 856.

No. 89–5036. A JUVENILE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 3d 124, 537 N. E. 2d 1286.

No. 89–5039. SINDRAM *v.* MARYLAND. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 89–5041. HARRIS *v.* HALL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 849 F. 2d 1469.

No. 89–5043. NELSON *v.* CITY OF MILWAUKEE. Sup. Ct. Wis. Certiorari denied. Reported below: 149 Wis. 2d 434, 439 N. W. 2d 562.

No. 89–5045. HAZIME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 658.

No. 89–5046. TELEPO *v.* SCHEIDEMENTEL, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5047. SZYMANSKI *v.* BUDGET RENTAL. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1089.

No. 89–5048. OTERO *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1440.

No. 89–5049. NEYLAND *v.* HENSHAW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 89–5050. BRADLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 24.

No. 89–5051. BENNETT *v.* ESTELLE. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 859.

No. 89–5052. BRYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 2d 1032.

No. 89–5054. MARSHBURN *v.* RICHARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 315.

No. 89–5055. MORRISON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 437 N. W. 2d 422.

No. 89–5059. SZYMANSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1030.

No. 89–5061. FILMORE *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT. C. A. 8th Cir. Certiorari denied.

No. 89–5063. ALBRIGHT *v.* ALAN NEUMAN PRODUCTIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 1388.

No. 89–5064. DOWLING *v.* VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 55.

No. 89–5065. JARRETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89–5066. CHURCH *v.* THOMPSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 416.

No. 89–5070. MCDONALD *v.* ONOH. Ct. App. Tenn. Certiorari denied. Reported below: 772 S. W. 2d 913.

No. 89–5073. BLACKMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 2d 378.

No. 89–5074. GOLDSMITH *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5075. BIONDI *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 873 F. 2d 1451.

No. 89–5076. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89–5077. WILLIAMS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5078. GRIFFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 419.

No. 89–5079. FLETCHER *v.* TENNESSEE DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 894.

No. 89–5080. HARRIS *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 315.

No. 89–5081. DAVIS *v.* DAVIS. Ct. Sp. App. Md. Certiorari denied.

No. 89–5082. BILDER *v.* CITY OF AKRON. Ct. App. Ohio, Summit County. Certiorari denied.

No. 89–5084. MOORE *v.* TENDER ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5085. WHITE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 73 N. Y. 2d 468, 539 N. E. 2d 577.

No. 89–5086. PROVOST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 172.

No. 89–5087. HOPKINS *v.* KENTUCKY PAROLE BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 864.

No. 89–5089. KALYON *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5091. PARRON *v.* QUICK, SUPERINTENDENT, WALLKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 87.

No. 89–5094. DUNKINS *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5098. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 812.

No. 89–5100. HORNBUCKLE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 769 S. W. 2d 89.

No. 89–5103. ROBINSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 2d 991, 538 N. Y. S. 2d 887.

No. 89–5105. HORNE *v.* ALLEN METROPOLITAN HOUSING AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1490.

No. 89–5107. PEREZ *v.* SEEVERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 425.

No. 89–5108. CROW *v.* FUCHS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1264.

No. 89–5111. RAMOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 899.

No. 89–5112. CASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 899.

No. 89–5113. BRAVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 859.

No. 89–5114. LONG *v.* JONES, ASSISTANT DIRECTOR, COMMAND B, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1497.

No. 89–5115. STOTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 288.

No. 89–5116. EDWARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89–5118. KANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 734.

No. 89–5122. RADEMAKER *v.* VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1424.

No. 89–5123. TAPIA *v.* TAPIA. Ct. App. N. M. Certiorari denied.

No. 89–5124. SHELTON *v.* MCCARTHY ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5126. ENGLISH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5127. KAAHANUI ET AL. *v.* PUBLIC UTILITIES COMMISSION OF HAWAII ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 70 Haw. 648, 796 P. 2d 996.

No. 89–5128. IVORY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89–5129. EVERROAD ET AL. *v.* CARPENTER ET AL. Ct. App. Ind. Certiorari denied. Reported below: 531 N. E. 2d 245.

No. 89–5130. DIAMOND *v.* WINSTON. Super. Ct. Pa. Certiorari denied.

No. 89–5131. NICHOLAS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 884 F. 2d 1397.

No. 89–5132. MCGHEE *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–5136. ROBERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 597.

No. 89–5137. ALARIO *v.* WHITLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89–5138. MOORE *v.* BROWN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1447.

No. 89–5139. TELEPO *v.* SCHEIDEMENTEL, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5140. OLSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 436 N. W. 2d 817.

No. 89–5141. GILMORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89–5142. ATWOOD *v.* LAWSON. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 3d 69, 536 N. E. 2d 1167.

No. 89–5143. TOMPKINS *v.* UNIVERSITY OF SOUTH ALABAMA ROTC, MILITARY SCIENCE DEPARTMENT, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89–5144. BERKERY *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 411.

No. 89–5145. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 674.

No. 89–5147. HAYWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 2d 378.

No. 89–5149. DIAZ-VILLAFANE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 2d 43.

No. 89–5150. JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 900.

No. 89–5152. DESS *v.* MCCORMICK, WARDEN. Sup. Ct. Mont. Certiorari denied.

No. 89–5153. ISAAK *v.* UNITED STATES; and
No. 89–5170. TARVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 899.

No. 89–5154. LUCAS *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–5157. WASHINGTON *v.* MARTIN ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5160. FLORES-DOMINGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 367.

No. 89–5161. RODGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 89–5162. MCCUBBINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5164. DAVIS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5165. WYCOFF *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1111.

No. 89–5166. CASTLEBERRY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 869 F. 2d 593.

No. 89–5168. TYLER *v.* CALLAHAN. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–5169. HERNANDEZ *v.* UNITED STATES; and
No. 89–5235. CARDONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 774.

No. 89–5171. DOLENC *v.* DEMORE ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5172. MOON *v.* NEWSOME ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 835.

No. 89–5176. EATON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 178 Ill. App. 3d 1157, 551 N. E. 2d 836.

No. 89–5177. WENDT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1169, 549 N. E. 2d 358.

No. 89–5179. PURDY, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF PURDY, ET AL. *v.* MONEX INTERNATIONAL LTD. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1521.

No. 89–5181. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 516.

No. 89–5182. NASH *v.* JONES, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5186. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 60.

No. 89–5188. WATSON *v.* AMERICAN GENERAL FIRE & CASUALTY CO. ET AL. Sup. Ct. Tex. Certiorari denied.

No. 89–5189. MCCARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89–5190. UHARRIET *v.* WORKERS COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–5192. TEMPEL *v.* VALLEY HOSPITAL ET AL. Sup. Ct. Alaska. Certiorari denied.

No. 89–5194. CHASE ET UX. *v.* HONSOWETZ. Ct. App. Ore. Certiorari denied.

No. 89–5195. MCCLINTON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 899.

No. 89–5196. BAZSULY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 973.

No. 89–5197. BENTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 974.

No. 89–5200. MORRIS *v.* CHRISTIAN HOSPITAL. C. A. 8th Cir. Certiorari denied.

No. 89–5202. FELIX *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 89–5203. NUBINE *v.* LYNAUGH. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1432.

No. 89–5204. OBANDO-VASQUEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 973.

No. 89–5205. LORZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1440.

No. 89–5206. SCHOOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 891.

No. 89–5209. COSTA-CABRERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89–5213. GALLAGHER *v.* PHILLIPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 103.

No. 89–5214. BENNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1496.

No. 89–5220. WILKUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 2d 649.

No. 89–5224. FARMER *v.* GODISKA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 588.

No. 89–5225. NAUM *v.* GRIDER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5226. ABATECOLA *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 815.

No. 89–5227. BRITTMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 827.

No. 89–5228. JOHNSON *v.* BUINNO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 55.

No. 89–5229. KUCHER *v.* DUKAKIS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89–5230. PALMARIELLO *v.* BUTLER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 491.

No. 89–5231. DAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1166, 549 N. E. 2d 356.

No. 89–5234. HEDRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89–5236. ANDERSON *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 540 So. 2d 974.

No. 89–5239. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 444.

No. 89–5240. LEAVITT *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 260.

No. 89–5242. WALKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 770 S. W. 2d 692.

No. 89–5243. JACOBOWITZ, AKA RICE, AKA SCHLESINGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 877 F. 2d 162.

No. 89–5246. KIRK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 61.

No. 89–5247. CARMONA *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–5248. MACGUIRE *v.* RASMUSSEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1439.

No. 89–5250. VELASQUEZ-MERCADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 632.

No. 89–5251. STEVENHAGEN *v.* BOLTZ. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1493.

No. 89–5255. DEMPSEY *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 89–5258. QUARLES *v.* MICHAELSON. C. A. 3d Cir. Certiorari denied.

No. 89–5259. PUCCI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 295.

No. 89–5261. DELOSSANTOS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 211 Conn. 258, 559 A. 2d 164.

No. 89–5262. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 71.

No. 89–5264. RIVA *v.* GETCHELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1434.

No. 89–5267. WALKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1390.

No. 89–5268. THOMAS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 150 Wis. 2d 374, 442 N. W. 2d 10.

No. 89–5269. REED *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 89–5273. DEMPSEY *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–5274. SMART *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1558.

No. 89–5276. ROPER ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 782.

No. 89–5278. COOK ET AL. *v.* MARTINEZ ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 89–5281. ROMAH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 860.

No. 89–5283. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 559.

No. 89–5285. HAMPTON *v.* EARL C. SMITH MOTOR FREIGHT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 864.

No. 89–5286. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 970.

No. 89–5287. PERCY *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1433.

No. 89–5288. BARTHOLOMEW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 89–5289. STANDLEY *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 296.

No. 89–5290. MORENO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89–5292. YURKO *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5293. PAIGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5294. TATE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89–5296. SHAW *v.* CAMPBELL, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 89–5298. YANG *v.* MCCARTHY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5299. RHOADS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied.

No. 89–5300. TAYLOR *v.* KNAPP ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 803.

No. 89–5301. HEARNE *v.* HEARNE. Ct. App. Tenn. Certiorari denied.

No. 89–5302. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 2d 1381.

No. 89–5303. DEGUZMAN *v.* UNITED STATES; and
No. 89–5317. HOYOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89–5305. SCOTT *v.* FRANK, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied.

No. 89–5307. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 312.

No. 89–5308. DUNN *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 195, 873 F. 2d 408.

No. 89–5312. ANTHONY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 873.

No. 89–5313. CLIFTON *v.* HENMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–5322. WHITE *v.* DENVER DISTRICT COURT ET AL. Sup. Ct. Colo. Certiorari denied.

No. 89–5323. BIRDEN *v.* NEW YORK. Ct. Cl. N. Y. Certiorari denied.

No. 89–5324. FARROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 382.

No. 89–5328. HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5329. ALADENOYE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1319.

No. 89–5332. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 317.

No. 89–5338. HARDEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 434 N. W. 2d 881.

No. 89–5339. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5340. SMITH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 898.

No. 89–5341. SHAH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1156.

No. 89–5342. MARINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 858.

No. 89–5345. MILLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 281.

No. 89–5347. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 2d 655.

No. 89–5351. TARVER *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89–5352. PRADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 873.

No. 89–5356. LAMBERTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 872.

No. 89–5358. REYNOLDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–5360. GESUALE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 860.

No. 89–5362. HINDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89–5365. DEMPSEY *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1434.

No. 89–5368. DIPALING *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 867 F. 2d 615.

No. 89–5375. LAROQUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 863.

No. 89–5376. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89–5378. JAMES ET AL. *v.* QUINLAN, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 627.

No. 89–5386. CASSADY *v.* ADAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF MONTGOMERY COUNTY SCHOOLS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 89–5388. MORSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 387.

No. 89–5406. RAYMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 383.

No. 89–5412. VARGAS *v.* YOUNG, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 2d 384.

No. 89–5415. CONNELLY *v.* GROSSMAN ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5423. BRAUGHTON *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 749 S. W. 2d 528.

No. 89–5427. GUNTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 1113.

No. 89–5436. KAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 658.

No. 89–5438. JARRETT *v.* VOLT TECHNICAL SERVICES ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5441. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 327.

No. 89–5451. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 684.

No. 89–5453. OLAYA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 419.

No. 89–5465. BETINSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89–5466. WILLIAMS-EL *v.* JOHNSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 224.

No. 88–1758. ONEIDA INDIAN NATION OF WISCONSIN ET AL. *v.* NEW YORK ET AL.; and

No. 88–1915. ONEIDA INDIAN NATION OF NEW YORK ET AL. *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. Reported below: 860 F. 2d 1145.

No. 88–1762. KIDD ET AL. *v.* F/V ST. PATRICK ET AL.; and

No. 88–1960. BERGEN, ADMINISTRATRIX OF THE ESTATE OF KAUPPINEN, ET AL. *v.* F/V ST. PATRICK ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 816 F. 2d 1345 and 866 F. 2d 318.

No. 88–1889. NORTON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 867 F. 2d 1354.

No. 88–1901. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 861 F. 2d 665.

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*[REPORTER'S NOTE: For a statement of JUSTICE WHITE'S views on this case, see his separate dissenting opinion in *McMonagle* v. *Northeast Women's Center, Inc.*, *post*, p. 901.]

No. 88–2088. TILLER *v.* FLUDD. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 863 F. 2d 822.

No. 89–72. AUTOMOBILE IMPORTERS OF AMERICA, INC., ET AL. *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 871 F. 2d 717.

No. 89–107. URQUHART & HASSELL *v.* CHAPMAN & COLE ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 865 F. 2d 676.

No. 89–199. ENCO MANUFACTURING CO., INC. *v.* CLAMP MANUFACTURING CO., INC. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 870 F. 2d 512.

No. 89–206. MEBA PENSION TRUST ET AL. *v.* RODRIGUEZ ET UX. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 872 F. 2d 69.

No. 89–5233. FARRELL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 181 Ill. App. 3d 446, 536 N. E. 2d 476.

No. 88–1769. MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO. *v.* VERMONT DEPARTMENT OF PUBLIC SERVICE ET AL. Sup. Ct. Vt. Motion of Continental Bank N. A. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 151 Vt. 73, 558 A. 2d 215.

No. 88–1844. ARIZONA *v.* IKIRT. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 160 Ariz. 113, 770 P. 2d 1159.

No. 88–1942. UNITED STATES *v.* BERNAL. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 861 F. 2d 434.

No. 88–1969. MCCORMICK, WARDEN *v.* FITZPATRICK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pau-*

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*[REPORTER'S NOTE: For a statement of JUSTICE WHITE'S views on this case, see his separate dissenting opinion in *McMonagle* v. *Northeast Women's Center, Inc.*, *post*, p. 901.]

peris granted. Certiorari denied. Reported below: 869 F. 2d 1247.

No. 88–1987. PENNSYLVANIA *v.* ZOOK. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 520 Pa. 210, 553 A. 2d 920.

No. 88–2068. PERRETTI, ATTORNEY GENERAL OF NEW JERSEY *v.* FULLER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 868 F. 2d 604.

No. 88–2079. ILLINOIS *v.* MAHAFFEY. Sup. Ct. Ill. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 128 Ill. 2d 388, 539 N. E. 2d 1172.

No. 89–87. OHIO *v.* HOWARD. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 42 Ohio St. 3d 18, 537 N. E. 2d 188.

No. 88–1899. LEVINE *v.* HEFFERNAN, CHIEF JUSTICE, SUPREME COURT OF WISCONSIN, ET AL. C. A. 7th Cir. Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 864 F. 2d 457.

No. 88–1982. CAMER ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. Ct. App. Wash. Motion of Eben Carlson for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 52 Wash. App. 531, 762 P. 2d 356.

No. 88–2000. COWPER, GOVERNOR OF ALASKA, ET AL. *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 869 F. 2d 1185.

No. 88–2023. ELLIS *v.* MUMFORD ET AL. C. A. 11th Cir. Motion of respondents for damages denied. Certiorari denied. Reported below: 867 F. 2d 1430.

No. 88–2098. TOWNSHIP OF PARKS, PENNSYLVANIA *v.* BABCOCK & WILCOX CO. C. A. 3d Cir. Motion of Pennsylvania State Association of Township Supervisors et al. for leave to file a

brief as *amici curiae* granted. Certiorari denied. Reported below: 866 F. 2d 1408.

No. 88–2112. MARTINEZ-VILLAREAL *v.* ARIZONA. Super. Ct. Ariz., County of Santa Cruz;

No. 88–7180. JARRELLS *v.* GEORGIA. Sup. Ct. Ga.;

No. 88–7217. GAMES *v.* INDIANA. Sup. Ct. Ind.;

No. 88–7222. TASSIN *v.* LOUISIANA. Sup. Ct. La.;

No. 88–7427. BALDWIN *v.* ALABAMA. Ct. Crim. App. Ala.;

No. 88–7469. O'NEAL *v.* MISSOURI. Sup. Ct. Mo.;

No. 88–7492. KUBAT *v.* GREER, WARDEN, ET AL. C. A. 7th Cir.;

No. 88–7520. MORAN *v.* WHITLEY, WARDEN, ET AL. Sup. Ct. Nev.;

No. 88–7557. SINGLETON *v.* LOCKHART, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir.;

No. 88–7567. JONES *v.* MISSOURI. Sup. Ct. Mo.;

No. 88–7620. PADILLA *v.* NEVADA. Sup. Ct. Nev.;

No. 89–5037. HILL *v.* ALABAMA. Ct. Crim. App. Ala.;

No. 89–5038. BROWNLEE *v.* ALABAMA. Sup. Ct. Ala.;

No. 89–5040. THOMPSON *v.* ALABAMA. Sup. Ct. Ala.;

No. 89–5060. COLEMAN *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 89–5071. DERRICK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 89–5092. CRANK *v.* TEXAS. Ct. Crim. App. Tex.;

No. 89–5093. CAVANAUGH *v.* NEVADA. Sup. Ct. Nev.;

No. 89–5099. KINSMAN *v.* GEORGIA. Sup. Ct. Ga.;

No. 89–5238. DRISCOLL *v.* MISSOURI. Sup. Ct. Mo.;

No. 89–5254. SINGLETON *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir.;

No. 89–5260. TEAGUE *v.* TENNESSEE. Ct. Crim. App. Tenn.;

No. 89–5270. MELSON *v.* TENNESSEE. Sup. Ct. Tenn.; and

No. 89–5399. KILGORE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 88–7180, 258 Ga. 833, 375 S. E. 2d 842; No. 88–7217, 535 N. E. 2d 530; No. 88–7222, 536 So. 2d 402; No. 88–7427, 539 So. 2d 1103; No. 88–7469, 766 S. W. 2d 91; No. 88–7492, 867 F. 2d 351; No. 88–7520, 105 Nev. 1041, 810 P. 2d 335; No. 88–7557, 871 F. 2d 1395; No. 88–7567, 767 S. W. 2d 41; No. 88–7620, 104 Nev. 867; No. 89–5037, 541 So. 2d 83; No. 89–5038, 545 So. 2d 166; No. 89–5040, 542 So. 2d 1300; No. 89–5071, 773 S. W. 2d 271; No. 89–5092, 761 S. W. 2d 328; No. 89–5093, 105 Nev. 1025, 810 P. 2d 319; No. 89–5099, 259 Ga. 89, 376 S. E. 2d

845; No. 89–5238, 767 S. W. 2d 5; No. 89–5254, 873 F. 2d 1440; No. 89–5260, 772 S. W. 2d 915; No. 89–5270, 772 S. W. 2d 417; No. 89–5399, 771 S. W. 2d 57.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–2130. D'ANGELO *v.* ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION. Sup. Ct. Ill. Motions of Illinois Attorneys for Criminal Justice, Justinian Society of Lawyers, and Illinois State Bar Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 126 Ill. 2d 45, 533 N. E. 2d 861.

No. 88–7230. DEMPSEY *v.* COCA-COLA CO. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 879 F. 2d 853.

No. 88–7232. HUDSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 538 So. 2d 829.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 88–7404. HOVERSTEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 437 N. W. 2d 240.

No. 88–7435. MARTIN *v.* TOWNSEND ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 875 F. 2d 311.

No. 89–5210. MARTIN *v.* DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY, INC., ET AL. C. A. D. C. Cir. Motion of pe-

titioner to defer consideration of the petition for certiorari denied. Certiorari denied.

No. 89–5211. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 877 F. 2d 56.

No. 88–7438. CARABALLO-SANDOVAL *v.* UNITED STATES; and No. 88–7480. CARABALLO-LUJAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari.* Reported below: 866 F. 2d 1343.

No. 89–82. RAYNER *v.* SMIRL ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari.* Reported below: 873 F. 2d 60.

No. 88–7466. SPEARMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for costs denied. Certiorari denied.

No. 88–7467. SPEARMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for costs denied. Certiorari denied.

No. 88–7495. POTTS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 96, 376 S. E. 2d 851.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition to consider whether a defendant may be prevented from questioning prospective jurors regarding their ability to adhere to a state sentencing law that precludes jurors from considering the likelihood of parole in their decision whether to impose life imprisonment or death.

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*[REPORTER'S NOTE: For a statement of JUSTICE WHITE'S views on this case, see his separate dissenting opinion in *McMonagle* v. *Northeast Women's Center, Inc.*, *post*, p. 901.]

Both the Georgia Supreme Court and the United States Court of Appeals for the Fifth Circuit have held that such a limit on *voir dire* is constitutional. 259 Ga. 96, 101, 376 S. E. 2d 851, 856 (1989); *King* v. *Lynaugh*, 850 F. 2d 1055, 1060–1061 (CA5 1988). These decisions, however, cannot be squared with minimal due process requirements permitting a defendant to ensure that the jurors who sentence him consider only those factors that the State has deemed relevant to their decision. In the many States that prohibit jury consideration of parole, the Constitution demands that the defendant be allowed to test the jurors' ability to set that factor aside.

Jack Howard Potts was convicted of murder. During *voir dire* in his sentencing proceeding, several members of the venire volunteered the information that their decision whether to impose the death penalty would be significantly affected by their assessment of the likelihood of parole if they sentenced petitioner to life in prison. Georgia law forbids jurors to consider the possibility of parole during their deliberations. Ga. Code Ann. § 17–8–76(a) (1982); *Horton* v. *State*, 249 Ga. 871, 873, 295 S. E. 2d 281, 284 (1982), cert. denied, 459 U. S. 1188 (1983). Accordingly, the trial judge asked these jurors if they could make their sentencing decision without regard to the possibility of parole; some suggested that they could not. Petitioner sought to question other prospective jurors about the nature and strength of their attitudes about parole on the ground that they, too, might be unable to set such considerations aside. The court refused to permit the questioning.

During its subsequent deliberations, the jury requested information about Potts' eligibility for parole if it were to impose a life sentence. The court instructed the jury to ignore parole in its deliberations, and the jury recommended that Potts be sentenced to death.

A sentence of death is the most violent and final sanction the State can inflict. Jurors who are charged with deciding whether to impose this most serious sanction must make their decision on the basis of law, not on prejudices that operate to the defendant's detriment. If a court fails to permit a defendant to take all reasonable steps to ensure impartial jury deliberations, it undermines the legitimacy of the capital sentencing process and of the legal system itself. By refusing to permit Potts to explore the jurors'

prejudices with respect to parole, the court seriously undermined his fundamental right to an unbiased jury.

It is a commonplace that a criminal defendant (and the state) is entitled to a jury that will follow the law as embodied in the trial judge's instructions. Thus, a juror who cannot conscientiously follow the law as articulated by the court must be excused. See, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510, 520 (1968) (on State's request, court must exclude for cause jurors who are so strongly opposed to the death penalty that they would in no circumstances consider imposing it). But the right to a jury that will follow the law would be nothing more than an empty promise if the criminal defendant were forbidden to inquire into prospective jurors' ability to abide by the court's instructions. A "right" without any effective means of vindication is hardly worthy of so lofty a designation.

The only means by which the defendant may vindicate his right to a jury that will follow the law is through our system of challenges—both peremptory and for cause. And the only means of developing the information necessary to decide which jurors should be challenged is *voir dire*. Accordingly, we have long held that, although the conduct of *voir dire* is a matter committed to the trial court's discretion, where there is substantial danger that jurors might consider impermissible factors in reaching their verdict, the defendant has a constitutional right to use *voir dire* to inquire into the jurors' beliefs respecting those factors. Most recently, in *Turner* v. *Murray*, 476 U. S. 28 (1986), we held that, in the sentencing phase of a capital case, a black defendant accused of killing a white man has a constitutional right to explore on *voir dire* whether prospective jurors harbor racial prejudices. *Id.*, at 36–37; accord, *Ham* v. *South Carolina*, 409 U. S. 524, 527 (1973); *Aldridge* v. *United States*, 283 U. S. 308, 315 (1931). When the defendant is a member of a racial minority, the danger that a juror might be influenced by racial prejudice is of such significance that the defendant *must* be permitted to ferret out such prejudice on *voir dire*.

A similar situation is presented here, where several jurors, without prompting, suggested that they would consider parole in their deliberations and that they would do so notwithstanding contrary instruction by the court. It is certainly not unreasonable to suggest that other jurors might well have subscribed to a similar prejudice. Where the risk of prejudice is both great and mani-

fest, it is an abuse of discretion for the trial court to prevent the defendant from inquiring into whether the jurors harbor such prejudice. Cf. *Ham* v. *South Carolina*, *supra*, at 527–528 (judge not required to examine jurors on *voir dire* to determine whether they are prejudiced against bearded people).

The court in this case instructed the jury to ignore the possibility of parole in deciding what sentence to impose. Without knowing whether the jurors were able to follow such instructions, however, we cannot be confident that the jury acted properly. Indeed, the efficacy of those instructions is cast into grave doubt by the indications that several prospective jurors were unable to follow them. Thus, the trial court's rulings were blatantly inconsistent: while acknowledging the applicability of a state law forbidding the jury to consider the possibility that Potts might be paroled if they did not sentence him to death, the court nonetheless deprived Potts of the right to develop sufficient information on *voir dire* to discern whether his sentencing jury would follow that law. Because I believe that the court thereby effectively deprived Potts of his constitutional rights, I respectfully dissent.

No. 88–7593. KRICKENBARGER-OLIVER *v.* HUYLER ET AL. C. A. 5th Cir. Certiorari before judgment denied.

No. 88–7619. ROBERTSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 48 Cal. 3d 18, 767 P. 2d 1109.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not take this view, I would grant the petition because it raises the recurring issue whether evidence of prior unadjudicated criminal conduct may be introduced at the sentencing stage of a capital trial. As I have noted before, see, *e. g.*, *Miranda* v. *California*, 486 U. S. 1038 (1988) (MARSHALL, J., dissenting from denial of certiorari); *Williams* v. *Lynaugh*, 484 U. S. 935 (1987) (MARSHALL, J., dissenting from denial of certiorari), the States' highest courts have reached varying conclusions on this issue.

In addition, the petition poses a second question of profound constitutional significance: whether a defendant's waiver of his

right to a jury in a capital sentencing proceeding is voluntary, knowing, and intelligent when no evidence indicates that he was aware of a state statute requiring the court to impose a life sentence if the sentencing jury failed to reach a unanimous decision. The California statute at issue here provides that "[i]f the trier of fact [at the sentencing stage] is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." 1977 Cal. Stats., ch. 316, § 12. State high courts faced with the issue whether a defendant must be aware of similar capital sentencing provisions have reached differing conclusions. Compare *Harris* v. *State*, 295 Md. 329, 339–340, 455 A. 2d 979, 984 (1983) (holding that a court must explain the effect of a jury deadlock for a waiver to be effective), with *People* v. *Morgan*, 112 Ill. 2d 111, 141–142, 492 N. E. 2d 1303, 1315–1316 (1986) (holding that a court need only explain that a unanimous vote is required before a jury can impose the death penalty), cert. denied, 479 U. S. 1101 (1987).

In 1978, a jury convicted Andrew Robertson of murder and sentenced him to death. On appeal, the California Supreme Court vacated that sentence and remanded the case to the trial court. 33 Cal. 3d 21, 655 P. 2d 279 (1982). In a second sentencing proceeding, Robertson indicated his intention to waive his right to a jury. The court then asked him several questions in an attempt to ascertain if Robertson was aware of the effects of a waiver. At no time during the colloquy did the judge read or paraphrase the jury deadlock provision; instead, the court simply stated: "You understand, also, that if you do waive jury and submit [your sentencing] to the Court, the Court will act solely. If you have a jury trial, before a verdict can be returned either way, it requires unanimous agreement of all twelve jurors; do you understand that?" Pet. for Cert. 8. Robertson answered that he understood and then waived his right to a sentencing jury. He was again sentenced to death; this time, the California Supreme Court affirmed.

Robertson now claims that his sentence should be overturned because his agreement to waive a jury in the second sentencing proceeding was not voluntary, knowing, and intelligent. Petitioner concedes that the court's instruction was literally correct; if the jurors were not unanimous in recommending life imprisonment, they could not return a verdict to that effect. It is

also true, however, that if they were not unanimously in favor of death, even if only one juror refused to agree to the death penalty, then the *court* was required to order a term of life imprisonment.

In rejecting this claim the California Supreme Court clearly could not rely on the argument that the trial court's instruction fairly apprised Robertson of the relevant law. Rather, the court presumed as a matter of law that Robertson's counsel must have informed him of that part of the law as to which the trial court's statement was misleading. The court adopted this presumption in the absence of any evidence that Robertson's counsel had informed him, or indeed even knew, of the relevant rule of law. Such a presumption is impossible to reconcile with this Court's decisions placing on the state the burden of establishing a valid waiver of a fundamental constitutional right. See, *e. g.*, *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986). Furthermore, it is directly contrary to our precedents requiring that any doubts arising inevitably from a silent record be resolved in favor of protecting the defendant's right to be sentenced by a jury. See *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962) ("Presuming waiver [of Sixth Amendment rights] from a silent record is impermissible"); *Boykin* v. *Alabama*, 395 U. S. 238, 242–243 (1969) (applying *Carnley* to jury waiver). A presumption that defendant's counsel will always inform him of the relevant factors in a decision to waive constitutional rights amounts to a rule that all waivers made after the defendant has retained counsel *necessarily* will be considered voluntary, knowing, and intelligent. Such a rule offends common sense and impermissibly strips a defendant of constitutional protections long recognized by this Court.

Respondent also argues that the court's presumption of knowledge was appropriate in this case because Robertson had previously been sentenced in a capital proceeding by a jury and thus was steeped in the intricacies of California capital sentencing law. But the jury in the first sentencing proceeding was unanimous in favor of death; in such a circumstance, there is no support for an assumption that Robertson was "familiar" with what might have happened at his first sentencing had one or more jurors held out. Indeed, this case is an especially inappropriate one in which to assume the defendant's knowledge of the law. A "hung jury" traditionally results in a mistrial, not the automatic imposition of a certain penalty; thus, even a sophisticated defendant might not be

aware of the peculiar ramifications of a deadlock in the capital sentencing context.

Lastly, the state court reasoned that Robertson's arguments would lead to the adoption of a standard "too stringent for any situation; no waiver requires the court to explain every single conceivable benefit and burden of the choice being made." 48 Cal. 3d 18, 38, 767 P. 2d 1109, 1118 (1989) (footnote omitted). To be sure, the defendant need not be informed of every minute consideration that might be of the faintest interest to him. Applied to this case, however, that reasoning is disingenuous; informing a defendant that he will automatically receive the lesser penalty if the jury is unable to agree after a reasonable time is plainly relevant, if not central, to a rational defendant's choice between being sentenced by a judge or a jury. That the trial court believed it necessary to give the defendant some (albeit misleading) information on precisely the statute implicated here evidences the crucial role the issue plays in a knowing and voluntary jury waiver. Requiring a court to impart this information accurately is hardly imposing an unreasonable burden where the issue is literally one of life and death.

I dissent.

No. 89–12. RICHARDSON ET AL. *v.* RICHARDSON-MERRELL, INC. C. A. D. C. Cir. Motions of Association of Birth Defect Children and Association of Trial Lawyers of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 273 U. S. App. D. C. 32, 857 F. 2d 823.

No. 89–31. FRIENDS OF WARWICK POND AND HOXSIE, ALSO WARWICK LAND TRUST, ET AL. *v.* CHILDREN'S FRIEND & SERVICE, INC., ET AL. Sup. Ct. R. I. Motion of respondents for award of costs and fees denied. Certiorari denied.

No. 89–38. GUARDIAN PLANS, INC., ET AL. *v.* TEAGUE ET AL. C. A. 4th Cir. Motion of American Cemetery Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 870 F. 2d 123.

No. 89–112. GOLDSTEIN *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Motion of Association of Bar Defense Counsel for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 47 Cal. 3d 937, 766 P. 2d 560.

No. 89–114. FREEMAN *v.* WEISSMANN. C. A. 2d Cir. Motion of Abass Alavi et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 868 F. 2d 1313.

No. 89–166. COURBOIS *v.* REDMON. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 89–5053. BOYD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. JUSTICE WHITE would grant certiorari.* Reported below: 542 So. 2d 1276.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89–5119. BERRIGAN ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 521 Pa. 609, 557 A. 2d 341.

No. 89–5271. MARTIN *v.* PENNSYLVANIA STATE REAL ESTATE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 89–5311. PARKER *v.* PARSONS, WARDEN, ET AL. C. A. 10th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 87–1705. BARRETT *v.* UNITED STATES ET AL., 492 U. S. 926;

No. 88–1802. CHOW *v.* ATTORNEY GRIEVANCE COMMISSION, 492 U. S. 919;

No. 88–1975. BARROW *v.* HAWKINS ET AL., 492 U. S. 921;

No. 88–6315. BELL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, 492 U. S. 925;

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*[REPORTER'S NOTE: For a statement of JUSTICE WHITE'S views on this case, see his separate dissenting opinion in *McMonagle* v. *Northeast Women's Center, Inc.*, *post*, p. 901.]

No. 88–7055. JOHNSON *v.* GOVERNMENT EMPLOYEES INSURANCE CO. ET AL., 492 U. S. 909; and

No. 88–7064. IREDIA *v.* UNITED STATES, 492 U. S. 921. Petitions for rehearing denied.

No. 88–5964. AINSWORTH *v.* CALIFORNIA, 488 U. S. 1050. Motion for leave to file petition for rehearing denied.

OCTOBER 4, 1989

Miscellaneous Order

No. A–240. MAREK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

OCTOBER 10, 1989

Dismissal Under Rule 53

No. 89–5221. PASTER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 876 F. 2d 1184.

Certiorari Granted—Vacated and Remanded. (See also No. 88–7535, *ante*, p. 1.)

No. 88–7468. WHIGHAM *v.* FOLTZ, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *Reed*, 489 U. S. 255 (1989).

No. 89–231. SHEARSON LEHMAN/AMERICAN EXPRESS INC. ET AL. *v.* BIRD, INDIVIDUALLY AND AS TRUSTEE OF THE FRANK L. BIRD PROFIT SHARING TRUST, ET AL. C. A. 2d Cir. Motion

of Securities Industry Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989). JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 871 F. 2d 292.

No. 89–265. EASTON PUBLISHING CO. *v.* BOETTGER. Sup. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *The Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989). Reported below: 521 Pa. 366, 555 A. 2d 1234.

No. 89–5484. JAMES *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Reported below: 772 S. W. 2d 84.

Miscellaneous Orders

No. — — —. NATIONAL RAILROAD PASSENGER CORPORATION *v.* TRANSPORTATION COMMUNICATIONS UNION ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–205 (89–440). CLARDY, EXECUTRIX OF THE ESTATE OF CLARDY, ET AL. *v.* SANDERS. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, granted, and it is ordered that the execution and enforcement of the judgment of the Supreme Court of Alabama, case No. 87–1070, is stayed pending this Court's action on the petition for writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit Court of Montgomery County, Alabama, Civil Action No. CV–87–448, remaining in effect.

No. A–247. HEALTHAMERICA ET AL. *v.* MENTON. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that the execution and enforcement of the judgment of the Supreme Court of Ala-

bama, case No. 87–1100, is stayed pending the timely filing and disposition of a petition for writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit Court of Mobile County, Alabama, Civil Action No. CV–86–003049, remaining in effect.

No. D–782. IN RE DISBARMENT OF RICKS. Everett Emett Ricks, Jr., of Long Beach, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The order of disbarment entered August 11, 1989 [492 U. S. 930], is vacated. The rule to show cause, heretofore issued on May 1, 1989 [490 U. S. 1044], is hereby discharged.

No. D–794. IN RE DISBARMENT OF MONTEMAYOR. Disbarment entered. [For earlier order herein, see 491 U. S. 903.]

No. D–797. IN RE DISBARMENT OF RIPES. Lawrence Ripes, of Northbrook, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on August 11, 1989 [492 U. S. 931], is hereby discharged.

No. D–800. IN RE DISBARMENT OF KLAN. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D–811. IN RE DISBARMENT OF POWELL. It is ordered that Nathan Norton Powell, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of the state parties to reopen the decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier decision herein, see, *e. g.*, 466 U. S. 144.]

No. 87–1045. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* KYLE; and

No. 87–1065. NATIONAL COUNCIL ON COMPENSATION INSURANCE *v.* KYLE ET AL., 488 U. S. 997. Motion of respondent Fred Kyle for attorney's fees granted, and the United States Court of Appeals for the Sixth Circuit is directed to determine the fee to be allowed for the work performed by counsel before this Court.

No. 87–1622. BRENDALE *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.;

No. 87–1697. WILKINSON *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL.; and

No. 87–1711. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION ET AL., 492 U. S. 408. Motion of respondents to retax costs granted, and it is ordered that two-thirds of the cost of the preparation of the joint appendix is assessed against respondents Confederated Tribes and Bands of the Yakima Indian Nation et al., and one-third of the cost of the preparation of the joint appendix is assessed against petitioner Philip Brendale.

No. 87–1965. ZINERMON ET AL. *v.* BURCH. C. A. 11th Cir. [Certiorari granted, 489 U. S. 1064.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 87–2013. BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK ET AL. *v.* FOX ET AL., 492 U. S. 469. Motion of respondents to retax costs denied.

No. 87–2048. TEXACO INC. *v.* HASBROUCK, DBA RICK'S TEXACO, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1105.] Motion of Service Station Dealers of America for leave to file a brief as *amicus curiae* granted.

No. 88–1264. SAFFLE, WARDEN, ET AL. *v.* PARKS. C. A. 10th Cir. [Certiorari granted, 490 U. S. 1034.] Motion of petitioners for leave to file a reply brief out of time granted.

No. 88–1323. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* EVERHART ET AL. C. A. 10th Cir. Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* granted.

No. 88–1640. MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. [Certiorari granted, 490 U. S. 1045.] Motion of respondent Detroit Free Press for reconsideration of the order denying the motion of divided argument [492 U. S. 936] denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 88–1668. ATLANTIC RICHFIELD CO. *v.* USA PETROLEUM CO. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1097.] Motion of Society of Independent Gasoline Marketers of America for leave to file a brief as *amicus curiae* granted.

No. 88–1775. PEEL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. [Certiorari granted, 492 U. S. 917.] Motion of National Board of Trial Advocacy for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–152. ENGLISH *v.* GENERAL ELECTRIC CO. C. A. 4th Cir.; and

No. 89–266. PORTLAND GENERAL ELECTRIC CO. *v.* MONTANA DEPARTMENT OF REVENUE ET AL. Sup. Ct. Mont. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–400. LUCAS ET AL. *v.* TOWNSEND, PRESIDENT OF THE BIBB COUNTY BOARD OF EDUCATION, ET AL. Appeal from D. C. M. D. Ga. Motion of appellees to expedite consideration of the appeal denied.

No. 89–5542. IN RE WILSON. Petition for writ of habeas corpus denied.

No. 89–5318. IN RE JORGENSON;

No. 89–5409. IN RE OGDEN; and

No. 89–5411. IN RE SOBAMOWO. Petitions for writs of mandamus and/or prohibition denied.

No. 89–5404. IN RE PALMER. Petition for writ of prohibition denied.

Certiorari Granted

No. 87–6700. SELVAGE *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of peti-

tioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition, but rephrased as follows: "At the time petitioner was tried, was there 'cause' for not raising a claim based upon arguments later accepted in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), and if not, would the application of a procedural bar to the claim result in a 'fundamental miscarriage of justice,' *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986)?" Reported below: 842 F. 2d 89.

No. 88–7164. HORTON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 88–7194. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 864 F. 2d 625.

No. 89–61. UNITED STATES *v.* OJEDA RIOS ET AL. C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 875 F. 2d 17.

No. 89–189. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JEFFERS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 832 F. 2d 476.

No. 89–243. ELI LILLY & CO. *v.* MEDTRONIC, INC. C. A. Fed. Cir. Motions for leave to file briefs as *amici curiae* filed by the following are granted: Procter & Gamble, Orrin G. Hatch et al., American Sterilizer Co., Intellectual Property Owners, Inc., Zimmer, Inc., et al., and Pfizer Hospital Products Group, Inc., et al. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 872 F. 2d 402.

Certiorari Denied

No. 88–148. SOUTHERN NATURAL GAS CO. *v.* FRITZ ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 523 So. 2d 12.

No. 88–1877. DEAN *v.* MARSH, SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1423.

No. 88–1931. CAMEN *v.* SAFECO INSURANCE COMPANY OF AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 612.

No. 88–2070. BROCKI *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 312.

No. 88–2134. BAZARIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 957.

No. 88–7494. CELESTINE *v.* CALIFORNIA FRANCHISE TAX BOARD. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 88–7590. PALMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 2d 1202.

No. 88–7625. PIMIENTA-REDONDO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 874 F. 2d 9.

No. 89–24. DANN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 2d 1189.

No. 89–43. HUGHES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 227, 378 S. E. 2d 853.

No. 89–53. MISSOURI DIVISION OF TRANSPORTATION ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 458.

No. 89–62. TURK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 298.

No. 89–68. GONCE ET AL. *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 872 F. 2d 995.

No. 89–74. NOBLE *v.* WATKINS, SECRETARY OF ENERGY. C. A. D. C. Cir. Certiorari denied.

No. 89–92. DAVIS IRON WORKS, INC. *v.* ROSENBAUM; and
No. 89–330. ROSENBAUM *v.* DAVIS IRON WORKS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1088.

No. 89–95. RIVERFRONT ASSOCIATES, LTD., ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR MAINLAND SAVINGS & LOAN ASSN. C. A. 10th Cir. Certiorari denied. Reported below: 872 F. 2d 955.

No. 89–103. GALAHAD *v.* WEINSHIENK, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–113. PLYMOUTH STAMPING DIVISION, ELTEC CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 1112.

No. 89–118. STONEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 102.

No. 89–120. SOUTHERN NATURAL GAS CO. *v.* UNITED STATES;
No. 89–122. WARRIOR & GULF NAVIGATION CO. *v.* UNITED STATES; and
No. 89–123. PARKER TOWING CO., INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 1550.

No. 89–143. LATRAVERSE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 7.

No. 89–186. COMMUNITY ELECTRIC SERVICE OF LOS ANGELES, INC. *v.* NATIONAL ELECTRICAL CONTRACTORS ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1235.

No. 89–191. TAYLOR ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–207. BRAINERD *v.* MASCO CORPORATION OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 871 F. 2d 626.

No. 89–217. GREGORIAN ET AL. *v.* IZVESTIA, MINISTRY OF FOREIGN TRADE OF THE UNION OF SOVIET SOCIALIST REPUBLICS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 1515.

No. 89–223. SCHOTTENFELD *v.* CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 308.

No. 89–224. CANNEDY ET AL. *v.* PACIFIC GAS & ELECTRIC CO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89-225. ROSENTHAL ET AL. *v.* VERLIN. Super. Ct. Pa. Certiorari denied.

No. 89-227. BROWN *v.* VIAL, HAMILTON, KOCH & KNOX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 295.

No. 89-229. LYONS ET AL. *v.* RHODE ISLAND PUBLIC EMPLOYEES COUNCIL 94 ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: 559 A. 2d 130.

No. 89-232. PORT CLINTON FISH CO. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 3d 93, 538 N. E. 2d 1055.

No. 89-233. GRAND LODGE OF TEXAS (ANCIENT, FREE, AND ACCEPTED MASONS), AS TRUSTEE FOR MASONIC HOME AND SCHOOL OF TEXAS, ET AL. *v.* GANT. C. A. 10th Cir. Certiorari denied.

No. 89-235. POLLY *v.* HOWELL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 657.

No. 89-236. COASTAL PETROLEUM CO. *v.* INTERNATIONAL MINERALS & CHEMICAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 819.

No. 89-238. HADLEY *v.* HADLEY. Ct. App. Wash. Certiorari denied. Reported below: 53 Wash. App. 1044.

No. 89-240. KOHL, BY HIS PARENTS AND GUARDIANS, KOHL ET UX. *v.* WOODHAVEN LEARNING CENTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 865 F. 2d 930.

No. 89-241. HULSEY *v.* USAIR, INC. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1423.

No. 89-248. TYLER *v.* YTURRI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1439.

No. 89-250. BLUE CROSS & BLUE SHIELD OF MARYLAND, INC. *v.* WEINER, PERSONAL REPRESENTATIVE OF THE ESTATE OF WEINER, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 868 F. 2d 1550.

No. 89-252. CLYDE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1026, 810 P. 2d 320.

No. 89–254. MARKER ET UX. *v.* RIESCHEL ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–256. TRIPLETT *v.* TRIPLETT. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 89–257. RRI REALTY CORP. *v.* INCORPORATED VILLAGE OF SOUTHAMPTON, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 911.

No. 89–261. BERMAN *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 48 Cal. 3d 517, 769 P. 2d 984.

No. 89–263. CALESNICK ET UX. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 309.

No. 89–268. BORDELON ET AL. *v.* MARSHALL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1486.

No. 89–271. BELISLE ET AL. *v.* ANZIVINO, TRUSTEE OF THE BANKRUPTCY ESTATE OF PLUNKETT, ET UX. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 512.

No. 89–273. JACKSON *v.* COUNTY OF WAYNE, MICHIGAN, ET AL. Ct. App. Mich. Certiorari denied.

No. 89–281. KEEL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 546 So. 2d 403.

No. 89–300. GEORGE *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 17 Conn. App. 587, 554 A. 2d 769.

No. 89–307. SUTHERLAND *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–309. SEVEN STAR, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 2d 225.

No. 89–310. MANIFOLD ET AL. *v.* BLUNT, SECRETARY OF STATE OF MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 863 F. 2d 1368.

No. 89–313. WOODS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 178 Ill. App. 3d 1159, 551 N. E. 2d 837.

No. 89–315. ROBERTSON *v.* SNOW ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 404 Mass. 515, 536 N. E. 2d 344.

No. 89–318. BARANCIK *v.* COUNTY OF MARIN, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 834.

No. 89–332. GENERAL TEAMSTERS, WAREHOUSEMEN & HELPERS UNION, LOCAL 890 *v.* J. R. NORTON CO. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 208 Cal. App. 3d 430, 256 Cal. Rptr. 246.

No. 89–340. LERMAN *v.* CITY OF PORTLAND, MAINE. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 852.

No. 89–341. GRADER *v.* CITY OF LYNNWOOD. Ct. App. Wash. Certiorari denied. Reported below: 53 Wash. App. 431, 767 P. 2d 952.

No. 89–347. WILLIAMS *v.* DVOSKIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 863.

No. 89–348. JACK L. HARGROVE BUILDERS, INC., ET AL. *v.* ROSCH. Sup. Ct. Ill. Certiorari denied. Reported below: 128 Ill. 2d 179, 538 N. E. 2d 530.

No. 89–360. LAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 17.

No. 89–406. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 170.

No. 89–408. JOYCE *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 56.

No. 89–420. MUSLIU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 89–421. DEMOS REALTY *v.* MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY. Sup. Ct. Minn. Certiorari denied. Reported below: 439 N. W. 2d 708.

No. 89–446. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 857.

No. 89–5042. BENZEL *v.* GRAMMER, INDIVIDUALLY AND AS WARDEN OF NEBRASKA STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1105.

No. 89–5056. SILVAGGIO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–5096. FRANKS ET AL. *v.* HARWELL, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1485.

No. 89–5178. MOSIER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 89–5184. RUTHERFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5187. CANNIZZARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 809.

No. 89–5216. CAMPBELL *v.* MCCORMICK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 89–5249. SMITH *v.* BUTLER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89–5252. SALAMONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 869 F. 2d 221.

No. 89–5291. LUFKIN *v.* NASSAU COUNTY POLICE DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5309. PRENZLER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5314. LUFKIN *v.* SHELL OIL CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 56.

No. 89–5315. HADDAD *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–5320. EDWARDS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 298 S. C. 272, 379 S. E. 2d 888.

No. 89–5321. HENDERSON *v.* CLINTON, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1082.

No. 89–5326. BOYD *v.* VILLAGE OF WHEELING, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1443.

No. 89–5330. VENERI *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5334. HAUPT *v.* BOARD OF PROFESSIONAL RESPONSIBILITY, DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied.

No. 89–5335. HERRING *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 758 S. W. 2d 849.

No. 89–5336. ANDREWS *v.* DAHM, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89–5337. GALLAGHER *v.* HALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 894.

No. 89–5344. VINSON *v.* WATKINS. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 971.

No. 89–5349. OGUNLEYE *v.* HARGETT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5350. YANG *v.* MCCARTHY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5354. WIGGINS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 89–5363. DAVIS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5364. DONATI *v.* JARVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1069.

No. 89–5367. BATES *v.* CALLINAN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–5369. BONDS *v.* WHARTON, SUPERINTENDENT, MEN'S CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied.

No. 89–5370. CLIFFORD *v.* MILLER. Sup. Ct. N. M. Certiorari denied.

No. 89–5371. AVERHART, AKA AZANIA *v.* MARTIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 424.

No. 89–5377. VINSON *v.* TEXAS BOARD OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–5379. DEMPSEY *v.* SOMERVILLE HOSPITAL ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–5381. GARCIA *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5384. HURD *v.* DORSEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–5387. PERKINS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 2d 384.

No. 89–5389. YOUNG *v.* PATTERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 308.

No. 89–5390. RODGERS *v.* RUSSELL, SUPERINTENDENT, LIMA CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied.

No. 89–5391. MARTIN *v.* CITY OF TULSA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 775 P. 2d 824.

No. 89–5393. RIGGINS *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1028.

No. 89–5400. LOCKERT *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 2d 384.

No. 89–5402. MALCOLM *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1439.

No. 89–5405. CROY *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1444.

No. 89–5410. WOJTCZAK *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89–5416. SANDERS *v.* TRICKEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 205.

No. 89–5417. WALTERS *v.* GAITHER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5418. LONG *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 49 Ohio App. 3d 1, 550 N. E. 2d 522.

No. 89–5425. GRANT *v.* FARNSWORTH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 869 F. 2d 1149.

No. 89–5429. DEMPSEY *v.* UNITED STATES ATTORNEY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 887 F. 2d 258.

No. 89–5456. SALAM *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 874 F. 2d 525.

No. 89–5458. GALLAWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 871.

No. 89–5459. SIMS *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89–5462. HARDIN *v.* BOYD CIRCUIT COURT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 382.

No. 89–5471. WAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1433.

No. 89–5472. TANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5480. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 385.

No. 89–5486. CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 817.

No. 89–5490. TYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 878 F. 2d 753.

No. 89–5491. CLEVELAND ET AL. *v.* UNITED STATES; and
No. 89–5494. ESMENDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 1431.

No. 89–5500. BRANHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5501. BROWN *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 542 So. 2d 220.

No. 89–5507. HUGHES *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5508. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89–5511. CASIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 860.

No. 89–5514. ACOSTA-CAZARES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 945.

No. 89–5523. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89–5525. TANNER *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–5530. ZARRILLI *v.* GARRITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 606.

No. 89–5536. LEACH, AKA YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 754.

No. 89–5544. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 2d 1268.

No. 89–5550. GORENC *v.* SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 503.

No. 89–5556. BROWN-BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89–5558. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 863.

No. 89–5559. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 137.

No. 87–7191. SOFFAR *v.* TEXAS. Ct. Crim. App. Tex.;
No. 88–7465. UNDERWOOD *v.* INDIANA. Sup. Ct. Ind.;
No. 89–219. BROWN *v.* ALABAMA. Sup. Ct. Ala.;
No. 89–5083. WILLIAMS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–5110. LINGAR *v.* MISSOURI. Sup. Ct. Mo.;
No. 89–5193. KENNEDY *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 89–5245. JULIUS *v.* JONES, WARDEN. C. A. 11th Cir.;
No. 89–5256. GUINAN *v.* MISSOURI. Sup. Ct. Mo.;
No. 89–5442. DELUNA *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.; and
No. 89–5496. COCHRAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: No. 87–7191, 742 S. W. 2d 371; No. 88–7465, 535 N. E. 2d 507; No. 89–219, 545 So. 2d 122; No. 89–5083, 773 S. W. 2d 525; No. 89–5110, 766 S. W. 2d 640; No. 89–5193, 545 So. 2d 214; No. 89–5245, 875 F. 2d 1520; No. 89–5256, 769 S. W. 2d 427; No. 89–5442, 873 F. 2d 757; No. 89–5496, 548 So. 2d 1062.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–1756. PLATT *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL. C. A. 7th Cir. Motion of Chicago Council of Lawyers for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 865 F. 2d 134.

No. 88–1937. JONES *v.* CELOTEX CORP. ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 857 F. 2d 273.

No. 88–1981. DERANGO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 873 F. 2d 1443.

No. 88–7142. PINO-PEREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 870 F. 2d 1230.

No. 88–2129. KENTUCKY *v.* TURNER. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 767 S. W. 2d 557.

No. 88–2133. COMMISSIONER OF INTERNAL REVENUE *v.* PRUSSIN ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE KENNEDY would grant certiorari. Reported below: 863 F. 2d 263.

No. 88–2137. MCMONAGLE ET AL. *v.* NORTHEAST WOMEN'S CENTER, INC. C. A. 3d Cir. Certiorari denied. Reported below: 868 F. 2d 1342.

JUSTICE WHITE, dissenting.

A question presented in this case is whether liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.* (1982 ed. and Supp. V), may be imposed where neither the "enterprise" nor the "pattern of racketeering activity" had any profit-making element. The Second and Eighth Circuits have held that it may not. *United States* v. *Ivic*, 700 F. 2d 51, 58–65 (CA2 1983) (enterprise or predicate acts must have financial purpose); *United States* v. *Flynn*, 852 F. 2d 1045, 1052 (CA8) (enterprise must be directed toward economic goal), cert. denied, 488 U. S. 974 (1988). The Third Circuit in this case upheld RICO liability despite the absence of any economic motivation on the part of the defendants. I would grant certiorari to resolve the conflict.

On the order list of October 2, 1989, the Court also denied certiorari in the following cases.

Norton v. *United States*, No. 88–1889, cert. denied, *ante*, p. 871: The Eleventh Circuit held that law enforcement officers reasonably relied on warrants calling for the search and seizure of "'all corporate records . . . which are evidence and instrumentalities of the offense set forth in Section 1954 of Title 18 of the United States Code,'" and that the evidence seized pursuant to that warrant was admissible under the good-faith exception to the exclusionary rule articulated in *United States* v. *Leon*, 468 U. S.

897 (1984). 867 F. 2d 1354, 1360 (1989). The decision of the Eleventh Circuit conflicts with the Tenth Circuit's decision that a warrant ordering the seizure of all records "relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act, 22 U. S. C. § 2778, and the Export Administration Act of 1979, 50 U. S. C. App. § 2410," was so facially overbroad that law enforcement officers could not reasonably rely on it, *United States* v. *Leary*, 846 F. 2d 592, 594 (1988), and a similar decision of the Ninth Circuit suppressing evidence seized under a warrant seeking "documents, books, ledgers, records and objects which are evidence of violations of federal criminal law," *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F. 2d 747, 749 (1989). The conflict should be resolved.

Bergen v. *F/V St. Patrick*, No. 88–1960, and *Kidd* v. *F/V St. Patrick*, No. 88–1762, cert. denied, *ante*, p. 871: The Ninth Circuit held that where a Death on the High Seas Act claim, 41 Stat. 537, 46 U. S. C. App. § 761 *et seq.* (1982 ed., Supp. V), is joined with a Jones Act claim, 41 Stat. 1007, 46 U. S. C. App. § 688 (1982 ed., Supp. V), neither statutory scheme may be supplemented by an award of punitive damages under general maritime law. 816 F. 2d 1345 (1987), modified, 866 F. 2d 318 (1989). This holding is contrary to the Fifth Circuit's decision in *In re Merry Shipping, Inc.*, 650 F. 2d 622, 625–626 (1981), that punitive damages are available under general maritime law even when such a claim is joined with a Jones Act claim. The conflict should be resolved.

Tiller v. *Fludd*, No. 88–2088, cert. denied, *ante*, p. 872: The Eleventh Circuit held that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), prohibits the use of race-based peremptory challenges by an attorney in a civil action. The Eleventh Circuit concluded that the trial court's participation in the exercise of the peremptory strikes provided the state action necessary to be a violation of the Equal Protection Clause. 863 F. 2d 822 (1989). The Eighth Circuit has expressed "'strong doubts'" whether *Batson* applies to civil actions, see *Swapshire* v. *Baer*, 865 F. 2d 948, 953 (1989); *Wilson* v. *Cross*, 845 F. 2d 163, 164 (1988), and this important issue should be resolved.

Caraballo-Sandoval v. *United States*, No. 88–7438, and *Caraballo-Lujan* v. *United States*, No. 88–7480, cert. denied, *ante*, p. 876: Pursuant to 98 Stat. 2044, 21 U. S. C. § 853(a) (1982 ed., Supp. V), defendants convicted of serious federal narcotics offenses must forfeit to the United States any assets derived from,

or used in, the commission of those crimes. 866 F. 2d 1343 (CA11 1989). The question here is whether, in this context, due process requires courts to provide a pretrial hearing to determine if some likelihood exists that the assets at issue will ultimately be subject to forfeiture. The Eleventh Circuit's resolution of this issue in this case conflicts with the Ninth Circuit's conclusion in *United States* v. *Crozier*, 777 F. 2d 1376, 1383–1384 (1985). The conflict should be resolved.

Automobile Importers of America, Inc. v. *Minnesota*, No. 89–72, cert. denied, *ante*, p. 872: The Eighth Circuit held that the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183, 15 U. S. C. § 2301 *et seq.*, does not pre-empt state efforts to regulate private dispute resolution mechanisms established by manufacturers to settle warranty disputes with consumers. 871 F. 2d 717 (1989). The Eighth Circuit's decision comports with that of the Fifth Circuit in *Chrysler Corp.* v. *Texas Motor Vehicle Comm'n*, 755 F. 2d 1192 (1985), but conflicts with the Fourth Circuit's decision in *Wolf* v. *Ford Motor Co.*, 829 F. 2d 1277 (1987). The conflict should be resolved.

Rayner v. *Smirl*, No. 89–82, cert. denied, *ante*, p. 876: The Fourth Circuit held that the whistle-blower provision of the Federal Railroad Safety Act of 1970, 84 Stat. 971, as amended, 45 U. S. C. § 441(a) (1982 ed. and Supp V), pre-empts a state-law action for wrongful discharge of a supervisory railroad employee who reports his employer's railroad safety violations. 873 F. 2d 60 (1989). In *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N. E. 2d 372 (1985), cert. denied, 475 U. S. 1122 (1986), the Illinois Supreme Court reached a contrary result under a nearly identical statute, holding that the whistle-blower provision of the Energy Reorganization Act of 1974, 92 Stat. 2951, as added, 42 U. S. C. § 5851 (1982 ed.), did not pre-empt a state-law action for wrongful discharge of an employee who reported nuclear safety violations. The issue should be addressed.

Witters v. *Washington Dept. of Services for Blind*, No. 89–94, cert. denied, *ante*, p. 850: Petitioner was disqualified from receiving vocational aid under a state program that is primarily federally funded because he wants to study to become a minister. After the denial of aid to petitioner was upheld by the Washington Supreme Court, 102 Wash. 2d 624, 689 P. 2d 53 (1984), this Court granted certiorari. We reversed, 474 U. S. 481 (1986), concluding that the Establishment Clause presented no constitutional bar-

rier to the vocational aid scheme, and remanded for further factual development and consideration of the program's legitimacy under the stricter dictates of the Washington Constitution's Establishment Clause. On remand, the Washington Supreme Court again upheld the denial of aid, this time on state constitutional grounds. 112 Wash. 2d 363, 771 P. 2d 1119 (1989). Petitioner now presses a free exercise claim under our *Sherbert* v. *Verner*, 374 U. S. 398 (1963), line of cases. This case presents important federal questions regarding the free exercise rights of citizens who participate in state aid programs that permit recipients a private choice in using funds received and regarding the extent to which state involvement with religion that does not violate the Establishment Clause is required by the Free Exercise Clause. The fact that 80 percent of the program's funding is federal also may raise significant Supremacy Clause issues. These important federal questions deserve attention.

Urquhart & Hassell v. *Chapman & Cole*, No. 89–107, cert. denied, *ante*, p. 872: Petitioner asked us to consider the Fifth Circuit's decision that an abuse-of-discretion standard applies in a case under Federal Rule of Civil Procedure 11 when courts of appeals review district court determinations on questions of law and fact. 865 F. 2d 676 (1989). Other Circuits have applied a *de novo* standard to questions of law in this context. See, *e. g.*, *Zaldivar* v. *Los Angeles*, 780 F. 2d 823, 829 (CA9 1986). We should resolve this conflict.

Enco Manufacturing Co. v. *Clamp Manufacturing Co.*, No. 89–199, cert. denied, *ante*, p. 872: A question presented in this case is whether a district court's finding of a likelihood of confusion in a trademark infringement matter under § 43(a) of the Lanham Trade-Mark Act, 60 Stat. 449, as amended, 15 U. S. C. § 1125(a), is reviewable under the "clearly erroneous" standard, as a finding of fact, or *de novo*, as a conclusion of law. 870 F. 2d 512 (CA9 1989). I have noted before that federal courts disagree over this question. See *Euroquilt, Inc.* v. *Scandia Down Corp.*, 475 U. S. 1147 (1986) (WHITE, J., dissenting from denial of certiorari); *Elby's Big Boy of Steubenville, Inc.* v. *Frisch's Restaurants, Inc.*, 459 U. S. 916 (1982) (same). We should resolve the conflict.

MEBA Pension Trust v. *Rodriguez*, No. 89–206, cert. denied, *ante*, p. 872: The Fourth Circuit held that the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1982 ed. and Supp. V), ap-

plies to a denial of benefits, when the denial is based on an action by the plan prior to ERISA's effective date. 872 F. 2d 69 (1989). Other Courts of Appeals have held to the contrary. See, *e. g.*, *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F. 2d 1496, 1501 (CA9 1984). This conflict should be resolved.

Boyd v. *Alabama*, No. 89–5053, cert. denied, *ante*, p. 883: The Alabama Supreme Court held that a warrantless search of an automobile in police custody need only be supported by probable cause. A showing of exigent circumstances is not required. 542 So. 2d 1276 (1986). Although this Court's decisions in cases such as *United States* v. *Johns*, 469 U. S. 478, 484 (1985); *California* v. *Carney*, 471 U. S. 386 (1985); and *Michigan* v. *Thomas*, 458 U. S. 259, 261–262 (1982) *(per curiam)*, appear to have foreclosed a contrary position, some courts have continued to require a showing of exigent circumstances before validating a warrantless automobile search, see, *e. g.*, *United States* v. *Alexander*, 835 F. 2d 1406, 1410 (CA11 1988); *United States* v. *Hepperle*, 810 F. 2d 836, 840 (CA8 1987). We should address this issue.

Farrell v. *Illinois*, No. 89–5233, cert. denied, *ante*, p. 872: The Illinois Appellate Court held that petitioner's affirmative response to a judge's question during his initial appearance regarding whether petitioner was going to hire an attorney was not enough to invoke petitioner's Sixth Amendment right to counsel under *Michigan* v. *Jackson*, 475 U. S. 625 (1986), and so did not bar further police-initiated interrogation. 181 Ill. App. 3d 446, 536 N. E. 2d 476 (1989). The Illinois Supreme Court denied discretionary review. 126 Ill. 2d 562, 541 N. E. 2d 1110 (1989). This holding is directly contrary to the holdings of *Fleming* v. *Kemp*, 837 F. 2d 940, 947 (CA11 1988) *(per curiam)*, and *Wilson* v. *Murray*, 806 F. 2d 1232, 1235 (CA4 1986), cert. denied, 484 U. S. 870 (1987). The conflict deserves our attention.

No. 88–6986. ORESKI *v.* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 865 F. 2d 578.

No. 89–234. CRATER *v.* MESA PETROLEUM CO. ET AL. Ct. App. La., 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 539 So. 2d 88.

No. 89–259. DEMOSTHENES, WARDEN *v.* NEUSCHAFER. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 860 F. 2d 1470.

No. 88–7294. DUNCAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 870 F. 2d 1532.

JUSTICE WHITE, dissenting.

This case involves the interpretation of 18 U. S. C. § 3663(a) (1982 ed., Supp. V), which provides that a court may order a defendant convicted under that title to make restitution "to any victim of such offense." *Ibid.* In this case, the Tenth Circuit read the term "offense" as used in § 3663(a) broadly: the term does not "restrict a sentencing judge to conside[r] only those acts for which conviction was had, or for which the defendant pleaded guilty." 870 F. 2d 1532, 1536 (1989). The Sixth Circuit, by contrast, has "adopted a narrow definition of 'offense' holding that '[a] natural construction of this language would require that the defendant make restitution only to victims of the offense for which he was convicted.'" *United States* v. *Mounts*, 793 F. 2d 125, 127 (1986) (citations omitted). I would grant the petition for a writ of certiorari in order to resolve this conflict.

No. 88–7388. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE BLACKMUN would grant certiorari. Reported below: 867 F. 2d 562.

No. 88–7503. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 295.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

The question presented by this certiorari petition is whether a district court may disregard the Sentencing Guidelines after finding that a defendant's criminal history score inadequately accounts for past conduct when the court could instead adjust for the inadequacy by increasing the criminal history category one or more levels. In *United States* v. *Lopez*, 871 F. 2d 513 (1989), a panel of the Court of Appeals for the Fifth Circuit characterized this issue as "a significant question concerning the appropriateness of departure from the Guidelines," *id.*, at 514, and answered it in the negative. Two days earlier, however, in petitioner's case a different panel of the same court had given a different answer to that

question. Petitioner's panel disposed of his case pursuant to Fifth Circuit Rule 47.5, which permits the Court of Appeals to leave unpublished those "opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law." There is thus a conflict within the Fifth Circuit on both the answer and the importance of the question petitioner presents to us.

Because the petition does not identify any *inter-Circuit* conflict concerning the question presented, and because the answer provided by the Fifth Circuit's published opinion is widely supported, the Court's denial of certiorari today is entirely consistent with rules governing the management of our certiorari docket.* It is unfortunate that the summary disposition of petitioner's case by the Fifth Circuit and this Court may require petitioner to serve an 18-month prison sentence when the Guidelines would specify a range between only 9 and 15 months even if petitioner's criminal history category were increased two full levels. That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case. Perhaps it is not too late for the Court of Appeals to exercise additional care in the administration of justice in this case.

No. 89–5148. WATKINS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

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*Other Circuits have reached the conclusion endorsed by the *Lopez* panel. See *United States* v. *Jackson*, 883 F. 2d 1007, 1009 (CA11 1989); *United States* v. *Cervantes*, 878 F. 2d 50, 53 (CA2 1989); *United States* v. *Miller*, 874 F. 2d 466, 470–471 (CA7 1989). See also *United States* v. *Joan*, 883 F. 2d 491, 495 (CA6 1989) (incrementally increasing offense level to account for inadequate criminal history when the defendant's criminal history score already placed him in the highest criminal history category).

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not take this view, I would grant the petition to decide whether a court's failure either to inform a capital sentencing jury that it must consider mitigating evidence or to explain the concept of mitigation undermines a capital defendant's right to have the jury "consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989). The judge's failure in this case to instruct the juries on the role of mitigating evidence created a substantial risk that the juries did not conduct their sentencing tasks properly. I therefore would vacate petitioner's death sentences and remand for new sentencing.

Petitioner Johnny Watkins was convicted of murder in two separate proceedings and sentenced to death for both crimes. The same judge presided at both trials. At the sentencing phase of each trial, petitioner's counsel introduced mitigating evidence concerning Watkins' character and urged the jury to consider those factors that called for mercy. The judge's instructions in each case stated that the prosecution had to prove beyond a reasonable doubt at least one of two aggravating circumstances:

> "(1) That, after consideration of the circumstances surrounding this offense or the prior history and background of the defendant, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> "(2) That the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved an aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." App. F to Pet. for Cert.

The instructions stated that each jury could sentence Watkins to death if it found that the State had proved the existence of one of the aggravating circumstances beyond a reasonable doubt; alternatively, the jury could choose the punishment of life imprisonment if it believed "from all the evidence that the death penalty is not justified." *Ibid.* The instructions did not mention "mitigating evidence" or any equivalent concept. The judge also read the

verdict form to the jury in each case. That form required the jury to certify that, in reaching its verdict, it had "considered evidence in mitigation of the offense." *Ibid.* The form offered no explanation of "evidence in mitigation."

Petitioner's objections to the instructions were overruled in both cases. On direct appeal, the Virginia Supreme Court rejected his contention that the instructions had overemphasized the jury's duty to consider aggravating circumstances and underemphasized its duty to consider mitigating factors. The court held that the instructions and verdict form sufficiently guided the jury's consideration and ensured that the jury had considered mitigating factors. On state habeas, the Circuit Court held, tersely, that "the jury was properly instructed as to all matters and findings that they were required to make, including but not limited to evidence in mitigation of punishment." App. D to Pet. for Cert. The State Supreme Court, without addressing petitioner's challenge to the instructions, refused to hear his appeal.

Two central principles pervade this Court's capital punishment jurisprudence. First, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986) (quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982)). Second, the sentencer's discretion "must be guided appropriately by objective standards," *Mills* v. *Maryland*, 486 U. S. 367, 374 (1988), "so as to minimize the risk of wholly arbitrary and capricious action," *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion). Although these two principles may at times come into "tension," *California* v. *Brown*, 479 U. S. 538, 544 (1987) (O'CONNOR, J., concurring), this case presents a situation in which both principles demand the vacation of petitioner's death sentences.

The Constitution does not require a specific set of instructions on mitigating circumstances. See *Zant* v. *Stephens*, 462 U. S. 862, 890 (1983). Nonetheless, "the jury instructions—taken as a whole—must clearly inform the jury that they are to consider any relevant mitigating evidence." *Brown*, *supra*, at 545 (O'CONNOR, J., concurring). The instructions in this case—that the juries could sentence petitioner to life if they believed from "all the evidence" that the death penalty was not justified—were simply insufficient to inform the juries of their duty to consider factors in mitigation. Nor did the verdict form correct this error, as it merely stated in boilerplate language that the juries had "consid-

ered evidence in mitigation of the offense." Although the instructions did not *preclude* consideration of relevant mitigating evidence, neither did they "clearly inform" the juries that they were required to consider such evidence. This situation creates an unacceptable risk that the juries did not consider "'factors which may call for a less severe penalty.'" See *Penry*, *supra*, at 328. Petitioner's case must accordingly be remanded for resentencing.

Even if the juries were aware of their obligation to consider mitigating evidence, the instructions provided absolutely no guidance on what constitutes relevant mitigating evidence or how the juries should have considered such evidence. "Mitigating evidence" is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 188 (1988) (O'CONNOR, J., concurring in judgment) ("We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death"). If it is possible for judges to misconstrue the term and exclude relevant mitigating evidence, see *Eddings* v. *Oklahoma*, *supra*, at 113–114, it seems probable that a jury operating without adequate guidance could do the same. The imposition of the death penalty should not be contingent on a particular jury's unguided understanding of a legal term of art. When a trial court refuses to give content to the words on which a defendant's life depends, the subsequent sentence is arbitrary and capricious. I therefore dissent.

No. 89–5327. SCHIRO *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 533 N. E. 2d 1201.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

There is a critical difference between a judgment of affirmance and an order denying a petition for a writ of certiorari. The former determines the rights of the parties; the latter expresses no opinion on the merits of the case.[1] Partly for that reason, and

[1] "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

"The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or

partly because our certiorari docket is so crowded, the Court does not explain its reasons for entering such orders. There is, accordingly, a danger that an individual Justice's statement of his or her views respecting the denial of certiorari may be misleading or counterproductive.[2] Nevertheless, I am persuaded that a brief comment on this troublesome and unusual case is appropriate.

This is a capital case. It is one of 63 such cases that were considered at our conference during the week of September 25, 1989. Despite the contrary views that were once expressed,[3] it is neither feasible nor wise for this Court to review the merits of every capital case in which the petitioner asks us to review the decision of a State's highest court. In many of these cases review of the federal constitutional issues is more effectively administered in federal habeas corpus proceedings.[4] The burdens associated with the delay in the date of execution are more than offset by the benefit of complete and adequate review of the decision to impose a death sentence.

In this case, despite the fact that petitioner was convicted of felony murder and sentenced to death in 1981, the Federal District Court has not yet had an opportunity to review his federal constitutional claims.[5] The Indiana Supreme Court has, however, considered the validity of the death sentence on four different occasions. First, while the case was pending on direct review, the court unanimously granted *the State's* petition to remand the case to the trial judge to enable him to make the findings of fact that the Indiana statute requires to support a death sentence. Sec-

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disapproval of what was said by the Court of Appeals of Maryland. The issues canvassed in the opinions of that court, and which the State of Maryland has asked us to review, are of a nature which very readily lend themselves to misconstruction of the denial of this petition. The present instance is peculiarly one where the redundant become the necessary." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

[2] See *Singleton* v. *Commissioner*, 439 U. S. 940, 945–946 (1978) (opinion of STEVENS, J., respecting denial of certiorari).

[3] See *Coleman* v. *Balkcom*, 451 U. S. 949, 956–964 (1981) (REHNQUIST, J., dissenting from denial of certiorari).

[4] *E. g.*, *Watkins* v. *Virginia*, 475 U. S. 1099, 1100 (1986) (opinion of STEVENS, J., respecting denial of certiorari).

[5] In 1986 petitioner did file an application for a writ of habeas corpus but the parties have advised that it was "remanded" to the state court because petitioner's state remedies had not yet been completely exhausted. See *Rose* v. *Lundy*, 455 U. S. 509 (1982).

ond, in 1983, after the trial judge entered his findings *nunc pro tunc*, a bare majority of the court affirmed the sentence and held that the findings were adequate to support the judge's decision to override the unanimous recommendation of the jury that the death penalty should not be imposed.[6] Third, in 1985, a bare majority of the court affirmed the denial of postconviction relief, rejecting the claim that the trial judge violated the Due Process Clause by relying in imposing the death sentence on personal observations of petitioner's conduct not previously disclosed to counsel.[7] Fourth, again by a bare majority, the Indiana Supreme Court rejected the claim that is asserted in the certiorari petition the Court has denied today.[8]

Petitioner claims that the imposition of a death sentence on the basis of the trial judge's finding that he intended to kill his victim, made after the jury had rejected the charge of intentional murder and had unanimously refused to recommend death, violates the Double Jeopardy Clause. It is undisputed that the trial judge's

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[6] See *Schiro* v. *State*, 451 N. E. 2d 1047 (1983). Ironically, although the trial judge refused to follow the jury's recommendation of life at the penalty phase, he apparently found its rejection of the insanity defense, at the guilt stage, dispositive on the sole aggravating factor that petitioner committed the murder intentionally. He explained that the sentence was supported by petitioner's conviction of felony murder and the fact that "[t]he jury rejected the plea of insanity by its verdict," further stating that since there was an aggravating circumstance and no mitigating circumstances to outweigh it, "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." *Id.*, at 1066–1067. One of the dissenting justices wrote:

"Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Luebbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind. Code § 35–41–3–6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling." *Id.*, at 1068 (Prentice, J., concurring and dissenting).

[7] See *Schiro* v. *State*, 479 N. E. 2d 556 (1985). In dissenting from the denial of certiorari, two Members of this Court expressed the opinion that the judge's rejection of the jury recommendation of no death sentence was inconsistent with the Court's holding in *Spaziano* v. *Florida*, 468 U. S. 447 (1984). See *Schiro* v. *Indiana*, 475 U. S. 1036 (1986) (MARSHALL, J., joined by BRENNAN, J.).

[8] See 533 N. E. 2d 1201 (1989).

finding that petitioner intended to kill his victim is an essential predicate for the death penalty. Under Indiana law, that finding had to be made beyond a reasonable doubt. Ind. Code Ann. § 35–50–2–9 (Supp. 1989). Yet, the jury twice indicated that it did not believe that the murder was intentional. First, the jury apparently rejected the prosecutor's contention, at the guilt stage, that petitioner committed the murder knowingly. Petitioner was charged with murder in the knowing killing of the victim in Count I and with felony murder in Count II; although the jury convicted him of the latter, it implicitly acquitted him of the knowing state of mind necessary to support a conviction on Count I. Second, after the prosecutor had again argued to the jury that the murder was intentional, the jury unanimously refused to recommend the death penalty. Petitioner's claim was rejected as a matter of state law by the Indiana Supreme Court, which held that the jury's refusal to convict on Count I was not an acquittal of the elements of the offense charged in that Count. That holding might well be sufficient reason to deny review of a case arising from a state collateral proceeding. Nonetheless, petitioner's claim has a federal dimension that demands fresh analysis when it is first considered on its merits in a federal court.[9]

It cannot be disputed that petitioner was placed in jeopardy within the meaning of the Fifth Amendment to the Federal Constitution when the trial on Count I commenced. See *Crist* v. *Bretz*, 437 U. S. 28 (1978). The fact that Indiana may not consider the jury's silence an "acquittal" as a matter of state law surely does not determine the constitutional question whether he could again be placed in jeopardy on the same charge. Cf. *Price* v. *Georgia*, 398 U. S. 323 (1970). Nor does it determine whether the action by the jury—especially when illuminated by its unanimous decision at the penalty hearing—should be given preclusive effect either under the principles of double jeopardy in capital cases enunciated in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), or under more general

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[9] "As our opinions have made clear, no higher duty exists in the judging process than to exercise meticulous care where the sentence may be, or is, death." Address of Justice Powell, Eleventh Circuit Conference, May 8–10, 1983. See also Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 5 (Aug. 23, 1989) ("The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review").

principles of collateral estoppel, see *Simpson* v. *Florida*, 403 U. S. 384 (1971); *Ashe* v. *Swenson*, 397 U. S. 436 (1970). These, as well as the other federal questions that petitioner has raised in the state courts, are open to and will presumably receive careful consideration from the federal court with habeas corpus jurisdiction over the case.[10]

The long delay that has occurred in this case is a matter of public concern and a matter that is relevant to any consideration of the efficacy of capital punishment. The State's dubious procedural scheme that allows a judge to override a jury's appraisal of the seriousness of a capital defendant's crime has resulted in eight years of litigation. Those years of litigation, and the costs that they have imposed on lawyers, judges, and court administrators, have not furthered any societal interest in incapacitation: since petitioner has been incarcerated continuously from the date of his trial, he has presented no greater threat to the community than if he had been executed promptly after the trial was completed. Nor, since juries presumably represent a fair cross section of the community, has the cost served any compelling interest in satisfying an outraged community's desire for revenge or retribution. The delay, however, is manifestly not relevant to, and should have no impact on, petitioner's entitlement to consideration of his substantial federal claims by the federal courts.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 88–5751. VAN CLEAVE *v.* INDIANA, 488 U. S. 1019;
No. 88–5957. GRANT *v.* CALIFORNIA, 488 U. S. 1050;
No. 88–5981. WILLIAMS *v.* CALIFORNIA, 488 U. S. 1050;
No. 88–6341. BONIN *v.* CALIFORNIA, 489 U. S. 1091; and
No. 88–6767. POLLACK *v.* UNITED STATES, 490 U. S. 1027.
Motions for leave to file petitions for rehearing denied.

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[10] Cf. *Ashe* v. *Swenson*, 397 U. S., at 437, n. 1 (applying *Benton* v. *Maryland*, 395 U. S. 784 (1969), retroactively to cases on federal habeas).

OCTOBER 13, 1989

Dismissal Under Rule 53

No. 89-343. CITY OF DETROIT ET AL. *v.* STEWARD ET UX. Ct. App. Mich. Certiorari dismissed under this Court's Rule 53.

OCTOBER 16, 1989

Vacated and Remanded on Appeal

No. 89-301. MONROE ET AL. *v.* CITY OF WOODVILLE, MISSISSIPPI, ET AL. Appeal from D. C. S. D. Miss. Judgment vacated and case remanded with instructions to dismiss the appeal as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Miscellaneous Orders

No. A-246. CONSUMER VALUE STORES *v.* BOARD OF PHARMACY OF NEW JERSEY. Sup. Ct. N. J. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D-793. IN RE DISBARMENT OF CARTWRIGHT. Disbarment entered. [For earlier order herein, see 491 U. S. 903.]

No. D-796. IN RE DISBARMENT OF CANNON. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D-804. IN RE DISBARMENT OF MCMANUS. George W. McManus, Jr., of Baltimore, Md., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on August 11, 1989 [492 U. S. 932], is hereby discharged.

No. D-812. IN RE DISBARMENT OF MAHSHIE. It is ordered that George Towfick Mahshie, of DeWitt, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-813. IN RE DISBARMENT OF KRAMER. It is ordered that Arthur Berlin Kramer, of Charlotte, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of North Carolina for leave to intervene referred to the Special Mas-

ter. Report of the Special Master on motions to intervene received and ordered filed. [For earlier order herein, see, *e. g.*, 490 U. S. 1104.]

No. 87–1720. TAYLOR *v.* PEABODY COAL CO. ET AL., 488 U. S. 988. Motion of counsel for approval of attorney's fees of petitioner, Hubert Taylor, referred to the United States Court of Appeals for the Seventh Circuit to determine whether fees are to be allowed at all and then, if so, to determine their amount for the work performed by counsel before this Court.

No. 88–192. MCKESSON CORP. *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL. Sup. Ct. Fla. [Certiorari granted, 488 U. S. 954.] Motion of California et al. for leave to file a brief as *amici curiae* granted.

No. 88–1668. ATLANTIC RICHFIELD CO. *v.* USA PETROLEUM CO. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1097.] Motion of Service Station Dealers of America for leave to file a brief as *amicus curiae* granted.

No. 89–353. SANCHEZ ET AL. *v.* BOND ET AL. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–5642. IN RE SPARKS. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 89–213. PENNSYLVANIA *v.* MUNIZ. Super. Ct. Pa. Certiorari granted. Reported below: 377 Pa. Super. 382, 547 A. 2d 419.

No. 89–258. CALIFORNIA *v.* AMERICAN STORES CO. ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 872 F. 2d 837.

No. 89–275. COOTER & GELL *v.* HARTMARX CORP. ET AL. C. A. D. C. Cir. Certiorari granted limited to Questions 1, 3, and 6 presented by the petition. Reported below: 277 U. S. App. D. C. 333, 875 F. 2d 890.

Certiorari Denied

No. 88–1912. LITTLE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 868 F. 2d 989.

No. 88–2107. JULIEN *v.* ZERINGUE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 1569.

No. 88–7348. WEATHERSBY *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1444.

No. 88–7545. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 123.

No. 88–7564. DOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 1248.

No. 88–7598. PROWS *v.* SPANIOL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–7599. NYBERG *v.* FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 545 So. 2d 871.

No. 88–7616. WOLFORD *v.* ARMONTROUT, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 89–142. ROSCO ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–157. PAN AMERICAN WORLD AIRWAYS, INC. *v.* CAUSEY, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CAUSEY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 812.

No. 89–169. IDAHO *v.* FAIN. Sup. Ct. Idaho. Certiorari denied. Reported below: 116 Idaho 82, 774 P. 2d 252.

No. 89–180. CITY OF GARFIELD HEIGHTS *v.* ASAD. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–287. NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION FOUNDATION, INC. *v.* AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO, ET AL.; and

No. 89–292. ESTATE OF GILPIN *v.* AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 2d 1310.

No. 89–291. RAMSEY *v.* BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 771 S. W. 2d 116.

No. 89–293. POSTMA *v.* DISTRICT COURT OF IOWA, PLYMOUTH COUNTY. Sup. Ct. Iowa. Certiorari denied. Reported below: 439 N. W. 2d 179.

No. 89–294. GORDON ET AL. *v.* DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 870.

No. 89–297. ARGO *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–299. KEMPE ET AL., JOINT LIQUIDATORS OF MENTOR INSURANCE LTD. *v.* OCEAN DRILLING & EXPLORATION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 1138.

No. 89–305. MCGUIRE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF MCGUIRE, A MINOR *v.* CITY OF WOODWARD, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–306. RILEY *v.* UNITED PARCEL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 311.

No. 89–308. FUKOKU KOGYO CO., LTD., ET AL. *v.* C. ITOH & CO., LTD. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 856.

No. 89–314. CITY OF NORMAN, OKLAHOMA, ET AL. *v.* O'ROURKE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 2d 1465.

No. 89–316. CITY OF MONTCLAIR, CALIFORNIA *v.* UNITED ARTISTS COMMUNICATIONS, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 209 Cal. App. 3d 245, 257 Cal. Rptr. 124.

No. 89–319. LAURENCE *v.* ANONYMOUS ET UX. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 144 App. Div. 2d 674, 534 N. Y. S. 2d 706.

No. 89–320. NATIONAL DEMOCRATIC POLICY COMMITTEE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 2d 156.

No. 89–321. CLYDE SANDOZ MASONRY CONTRACTORS, INC., ET AL. *v.* JOYCE, TRUSTEE OF THE BRICKLAYERS & TROWEL

TRADES INTERNATIONAL PENSION FUND, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 276 U. S. App. D. C. 379, 871 F. 2d 1119.

No. 89–325. DZINGLSKI *v.* WEIRTON STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 1075.

No. 89–326. YOUNG, DBA TIFFANY'S *v.* MOUNT HAWLEY INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–328. A. O. SMITH HARVESTORE PRODUCTS, INC., ET AL. *v.* SAYLOR ET UX., DBA UDDER NONSENSE DAIRY. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1028.

No. 89–336. KRINSK *v.* FUND ASSET MANAGEMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 404.

No. 89–338. ANDREWS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 529 N. E. 2d 360.

No. 89–345. KAMECKI, ADMINISTRATRIX OF THE ESTATE OF KAMECKI *v.* SMILEVSKY. Ct. App. D. C. Certiorari denied.

No. 89–361. PARRISH *v.* JOURNIGAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 316.

No. 89–367. CAPODAGLI, ADMINISTRATRIX OF THE ESTATE OF CAPODAGLI *v.* WILSON. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 180 Ill. App. 3d 456, 536 N. E. 2d 135.

No. 89–371. AMERICAN STEAMSHIP CO. *v.* MUSLEH. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 382.

No. 89–391. DIETZ ET UX. *v.* COMPTROLLER OF THE TREASURY, INCOME TAX DIVISION OF THE STATE OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 78 Md. App. 708.

No. 89–413. JOCHEN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 428.

No. 89–429. INTERNATIONAL COMMERCIAL BANK OF CHINA *v.* NATIONAL BANK OF PAKISTAN. App. Div., Sup. Ct. N. Y., 1st

Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 2d 994, 537 N. Y. S. 2d 941.

No. 89-432. PICOU *v.* GILLUM, SHERIFF, PASCO COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 1519.

No. 89-436. KEENE CORP. *v.* INDEPENDENT SCHOOL DISTRICT NO. 622 ET AL. Ct. App. Minn. Certiorari denied.

No. 89-458. BADGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89-461. CAMOSCIO *v.* DUKAKIS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 854.

No. 89-5069. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 545 So. 2d 877.

No. 89-5097. WILLIAMS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 73.

No. 89-5134. HOUSTON *v.* LACK, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 864.

No. 89-5156. FIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89-5180. MORGAN *v.* JACKSON, COMMISSIONER OF CORRECTIONAL FACILITY, WESTCHESTER COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 682.

No. 89-5207. DAWES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 874 F. 2d 746.

No. 89-5217. JONES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 149 Wis. 2d 763, 441 N. W. 2d 755.

No. 89-5218. FORESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 983.

No. 89-5359. DAVIS *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 867 F. 2d 1003.

No. 89-5366. BROFFORD *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 89-5392. COFIELD *v.* ADAMS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89-5422. MORROW *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 757 S. W. 2d 484.

No. 89-5424. VINSON *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS ET AL. C. A. 5th Cir. Certiorari denied.

No. 89-5426. THOMAS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 669.

No. 89-5432. TELEPO *v.* SCHEIDEMENTEL, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER. C. A. 3d Cir. Certiorari denied.

No. 89-5445. ANSARI *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 426.

No. 89-5447. JAMES *v.* MORRIS, JUDGE, CIRCUIT COURT OF SOUTH CAROLINA, THIRD CIRCUIT, ET AL. Sup. Ct. S. C. Certiorari denied.

No. 89-5449. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 208 Cal. App. 3d 721, 256 Cal. Rptr. 446.

No. 89-5454. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 177 Ill. App. 3d 743, 532 N. E. 2d 447.

No. 89-5455. STANDLEY *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 296.

No. 89-5457. TELEPO *v.* SCHEIDEMENTEL, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89-5461. JOHNSON *v.* HEARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 72.

No. 89-5463. GRASTY *v.* FOLTZ. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 62.

No. 89–5464. CHARBONEAU *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 116 Idaho 129, 774 P. 2d 299.

No. 89–5467. DENARDO *v.* MUNICIPALITY OF ANCHORAGE ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 775 P. 2d 515.

No. 89–5468. BARBER *v.* MUNICIPALITY OF ANCHORAGE, ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 776 P. 2d 1035.

No. 89–5469. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5474. BONILLAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 48 Cal. 3d 757, 771 P. 2d 844.

No. 89–5483. DITTA *v.* BRANCH MOTOR EXPRESS & FREIGHT DRIVERS, HELPERS, DOCKMEN & ALLIED WORKERS, LOCAL UNION 375. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1318.

No. 89–5557. BLANCO-TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89–5561. WEBER *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN'S SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–5584. BLOW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 89–5587. LECKSTROM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 513.

No. 89–5590. GAYLE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 419.

No. 89–5594. FARRELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 870.

No. 89–5598. AUBREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 825.

No. 89–5599. MCINTOSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 387.

No. 89–5604. TOOLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1072.

No. 89–5606. SATTIEWHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 971.

No. 89–5610. DAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 883 F. 2d 1022.

No. 89–5612. PICKERING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 883 F. 2d 1022.

No. 88–1956. GEORGIA *v.* ROPER. Sup. Ct. Ga. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 258 Ga. 847, 375 S. E. 2d 600.

No. 89–151. IDAHO *v.* CHARBONEAU. Sup. Ct. Idaho. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 116 Idaho 129, 774 P. 2d 299.

No. 89–176. IDAHO *v.* LEAVITT. Sup. Ct. Idaho. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 116 Idaho 285, 775 P. 2d 599.

No. 89–48. HULSEY *v.* SARGENT, WARDEN. C. A. 8th Cir.;
No. 89–5068. BANDA *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–5117. CLARK *v.* NEW MEXICO. Sup. Ct. N. M.;
No. 89–5397. MAGWOOD *v.* ALABAMA. Sup. Ct. Ala.; and
No. 89–5421. ROGERS *v.* KEMP, WARDEN. Sup. Ct. Ga.
Certiorari denied. Reported below: No. 89–48, 865 F. 2d 954; No. 89–5068, 768 S. W. 2d 294; No. 89–5117, 108 N. M. 288, 772 P. 2d 322; No. 89–5397, 548 So. 2d 516.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–67. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 873 F. 2d 900.

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No. 89-144. LOCAL UNION NO. 246, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO *v.* BICKERSTAFF CLAY PRODUCTS CO., INC., ET AL. C. A. 11th Cir. Motion for leave to intervene in order to file a petition for writ of certiorari denied. Certiorari denied. Reported below: 871 F. 2d 980.

No. 89-335. BORMANN ET AL. *v.* AT&T COMMUNICATIONS, INC. C. A. 2d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 875 F. 2d 399.

No. 89-5072. WILKERSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to determine whether a prosecutor's exercise of peremptory challenges based in part on racial considerations violates the Equal Protection Clause.

I

Richard Wilkerson, an Afro-American, was convicted of murder by an all-white jury and sentenced to death. During *voir dire*, the prosecution exercised 4 of its 12 peremptory challenges to remove all of the potential Afro-American jurors. After trial, while petitioner's case was pending on direct review, this Court held that the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). Petitioner subsequently raised a *Batson* claim in a petition for habeas corpus filed in state court.

The trial court concluded that Wilkerson had made a prima facie showing of purposeful discrimination by the prosecution in the jury selection process. At the *Batson* hearing, one of the prosecutors who conducted *voir dire* conceded that race was a factor in his peremptory strike of an Afro-American juror:

"Q. . . . When you say you felt a little uneasy about [the juror] generally, was it your considered opinion that the fact that she was black and that the Defendant was black might have some factor or might be some factor in her decision-making process?

"A. I was not completely satisfied that it would not, but that was my uneasiness." App. to Pet. for Cert. 3.

Responding to questions concerning his peremptory strike of a different juror, the prosecutor indicated that he "thought perhaps [the juror] might make some identification I guess, with the defendant to some extent." *Id.*, at 3–4. The questioning continued:

"Q. Based on [the defendant and the juror] being of the same race?

"A. Yeah, that is just a factor." *Id.*, at 4.

Finally, on redirect examination by the State, the same prosecutor stated that his perception that an Afro-American juror would extend sympathy to an Afro-American defendant was "[o]ne of the many considerations [for striking a particular juror] but nothing major about that." *Id.*, at 76.

The trial court nonetheless concluded that the prosecutors "did not exercise peremptory challenges in a discriminatory manner to exclude venirepersons based upon racial considerations, nor did they, in any way, purposefully or deliberately deny jury participation to black persons because of race." *Id.*, at 10. The court based this legal conclusion on several pages of factual findings that relate in detail the prosecution's race-neutral explanations for its peremptory challenges to the Afro-American venirepersons. Unaccountably, these findings do not mention, much less discuss, the prosecution's open admissions that race played a role in its decision to prevent the Afro-American members of the venire from serving on the petit jury. This omission in the state court's factual findings provides ample justification for this Court to dispense with the traditional deference, now codified by statute, that such findings are accorded on federal review. See 28 U. S. C. § 2254(d)(8) (1982 ed.) (presumption of correctness overcome if a federal court concludes that a state court's "factual determination[s] [are] not fairly supported by the record"). Accordingly, this case is properly characterized as one involving mixed prosecutorial mo-

tives in that the decision to challenge the Afro-American jurors rested on both race-neutral considerations and race-conscious factors.

II

The state trial court's implicit legal conclusion—that the Constitution does not prohibit a prosecutor from striking a juror even when the decision is based in part on his "intuitive judgment [that the juror] would be partial to the defendant because of their shared race," *Batson* v. *Kentucky*, 476 U. S., at 97—cannot be squared with *Batson*'s unqualified requirement that the state offer "a *neutral* explanation" for its peremptory challenge, *id.*, at 98 (emphasis added). To be "neutral," the explanation must be based *wholly* on nonracial criteria.

The trial court seems to have transferred a legal standard formulated in other contexts to the *Batson* inquiry by requiring the defendant to show that the Afro-American venirepersons would not have been challenged "but for" the prosecution's impermissible assumptions about race. In some instances in which a defendant's actions were motivated by a mixture of permissible and impermissible factors, we have recognized as a defense to liability a showing that the challenged actions would have occurred even absent the improper consideration. See, *e. g.*, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285–287 (1977) (decision to terminate employment). A "but for" test is inappropriate in the *Batson* inquiry, however, because of the special difficulties of proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter.

The "but for" standard requires the factfinder to address a counterfactual: whether a prosecutor would have struck the challenged Afro-American jurors if his decisions had not been clouded by impermissible racial considerations. Put another way, the question is whether the prosecutor would have struck the Afro-American jurors had they been white. To answer this question, the factfinder must decide whether the prosecutor's intuitive, racially neutral reservations about the challenged Afro-American jurors were in each case greater than his intuitive reservations about the white jurors whom he chose not to strike. The court must determine not only whether a prosecutor's denial of racial motivation is credible—the current *Batson* question—but also whether a prosecutor's explanation for his *lack* of objection to white jurors is credible so that it can undertake the difficult task

of comparing prosecutorial judgments of challenged and unchallenged jurors.

But how is the factfinder to uncover the prosecutor's intuitive reservations regarding the unchallenged white jurors? The only avenue of inquiry is to ask the prosecutor himself. If he claims not to have entertained such reservations, the questioning must end, because external corroboration of the prosecutor's explanation of his inaction is necessarily unavailable. No record memorializes the prosecutor's contemporaneous justifications for failing to challenge a juror. Moreover, given the purely subjective nature of peremptory challenges, such a record could not be made. Thus, the prosecutor's claim that he harbored no reservations regarding a particular juror is insulated from meaningful review. In contrast, some external corroboration *is* available regarding the prosecutor's affirmative decisions to strike; the factfinder can examine a prosecutor's justifications in light of the characteristics of the jurors actually struck to determine generally whether the justifications were merely pretexts for racially motivated considerations.

In this respect, the *Batson* context differs decisively from the employment context, where the court can examine an employer's treatment of similarly situated applicants to test an employer's assertion that an Afro-American candidate would not have been hired absent a discriminatory motive. When an employer hires a white candidate over an Afro-American candidate, a factfinder can assess the employer's faithfulness to its own nonracial criteria by examining whether the particular white candidate's qualifications, as defined by the criteria, were superior to those of the Afro-American candidate. In the *Batson* context, though, the criteria underlying a prosecutor's peremptory challenges are private; a factfinder therefore lacks an independent means of evaluating the prosecutor's decisionmaking.

Thus, the "but for" test transforms a difficult credibility assessment—whether the prosecutor acted for the reasons he claims to have acted—into an impossible one—whether a prosecutor's nonracial ground for striking an Afro-American juror, taken alone, would have outweighed the prosecutor's possible grounds for objecting to unchallenged white jurors. The only choice, an untenable one at best, would be to accept at face value a prosecutor's claim that he "would have struck the Afro-American jurors anyway." A judicial inquiry designed to safeguard a criminal defend-

ant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias.

III

Batson's greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors. Assuming good faith on the part of all involved, *Batson*'s mandate requires the parties "to confront and overcome their own racism on all levels," *Batson* v. *Kentucky*, 476 U. S., at 106 (MARSHALL, J., concurring), a most difficult challenge to meet. This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice—the cases in which a proffered "neutral explanation" plainly betrays an underlying impermissible purpose. To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. *Batson* would thereby become irrelevant, and racial discrimination in jury selection, perhaps the greatest embarrassment in the administration of our criminal justice system, would go undeterred. If such "smoking guns" are ignored, we have little hope of combating the more subtle forms of racial discrimination.

In sum, while I remain committed to my view that, until peremptory challenges are eliminated altogether, these challenges will inevitably be used to discriminate against racial minorities, *Batson* v. *Kentucky*, *supra*, at 103, 107–108 (MARSHALL, J., concurring), I would find that this Court's requirement that a prosecutor provide a "neutral" explanation for challenging an Afro-American juror means just what it says—that the explanation must not be tainted by *any* impermissible factors. Requiring anything less undermines an already underprotective means of safeguarding the integrity of the criminal jury selection process.

OCTOBER 17, 1989

Dismissals Under Rule 53

No. 89-435. IN RE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., ET AL. Petition for writ of mandamus dismissed under this Court's Rule 53.

No. 87–1294. CAPE PUBLICATIONS, INC., ET AL. *v.* HITCHNER ET UX. Appeal from Dist. Ct. App. Fla., 5th Dist., dismissed under this Court's Rule 53. Reported below: 514 So. 2d 1136.

OCTOBER 30, 1989

Certiorari Granted—Vacated and Remanded

No. 88–1601. PULLMAN-STANDARD, INC. *v.* SWINT ET AL.; and

No. 88–1602. SWINT ET AL. *v.* PULLMAN-STANDARD, INC., ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989), *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), and *Owens* v. *Okure*, 488 U. S. 235 (1989). Reported below: 854 F. 2d 1549.

Miscellaneous Orders

No. — — ——. MILLER ET AL. *v.* FARMERS ALLIANCE MUTUAL INSURANCE CO. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–269. RICE *v.* UNITED STATES. Application for release on bond, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–276. PISELLO *v.* UNITED STATES. D. C. C. D. Cal. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–798. IN RE DISBARMENT OF ZEALY. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the Special Master for allowance of interim fees and disbursements granted, and the Special Master is awarded $55,936.76 to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 802.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Interim report of the Special Master received and ordered filed. Motion of the Special Master for allowance of compensation and reimbursement of expenses granted, and the Special Master is awarded $22,200.83, one-third to be paid by each party. [For earlier order herein, see, *e. g.*, 489 U. S. 1005.]

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of Texas for leave to file an amended complaint in intervention referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 915.]

No. 88–1125. HODGSON ET AL. *v.* MINNESOTA ET AL. C. A. 8th Cir. [Certiorari granted, 492 U. S. 917.] Motions of Jeff White et al., Stanley John, Kenneth Fisher, and Herbert Ratner for leave to file briefs as *amici curiae* denied.

No. 88–1400. FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL. C. A. 7th Cir. [Certiorari granted, 490 U. S. 1019.] Motion of respondents for reconsideration of order denying motion for divided argument [*ante*, p. 803] denied. Request of respondents to submit the case on the briefs denied.

No. 88–1503. CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL. Sup. Ct. Mo. [Certiorari granted, 492 U. S. 917.] Motions for leave to file briefs as *amici curiae* filed by the following are denied: Frances Ambrose, Ralph Buglioni, Jack Butler, Center for Catholic Policy of the Free Congress Foundation, Christian Action Council et al., Philip Dreisbach, James Dunlap, Lawrence J. Frieders, Mechtild Grothues, Paul Marx, J. G. Morriss, National Nurses for Life, Nurses for Life of Missouri, Pharmacists for Life, Right to Life League of Southern California, Inc., and Herbert Ratner.

No. 88–1725. VENEGAS *v.* MITCHELL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 806.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 88–1932. UNITED STATES *v.* MUNOZ-FLORES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 808.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–1951. UNITED STATES *v.* DALM. C. A. 6th Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–1972. ILLINOIS *v.* PERKINS. App. Ct. Ill., 5th Dist. [Certiorari granted, *ante*, p. 808.] Motion for appointment of counsel granted, and it is ordered that Daniel M. Kirwin, Esq., of Mt. Vernon, Ill., be appointed to serve as counsel for respondent in this case.

No. 88–6546. DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA

INDIAN COMMUNITY, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1034.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88-7146. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL. Sup. Ct. Ark. [Certiorari granted, 492 U. S. 917.] Motion of Washington Legal Foundation et al. for leave to file a brief as *amici curiae* granted.

No. 89-65. FORT STEWART SCHOOLS *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 89-400. LUCAS ET AL. *v.* TOWNSEND, PRESIDENT OF THE BIBB COUNTY BOARD OF EDUCATION, ET AL. Appeal from D. C. M. D. Ga. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89-5398. JOHNSTON *v.* ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 20, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89-5700. REIS *v.* NEW YORK STATE HOUSING FINANCE AGENCY. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 20, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari with-

out reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–5374. IN RE GOTTLIEB; and

No. 89–5705. IN RE WATTERS. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 88–2018. ILLINOIS *v.* RODRIGUEZ. App. Ct. Ill., 1st Dist. Certiorari granted. Reported below: 177 Ill. App. 3d 1154, 550 N. E. 2d 65.

No. 89–386. PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY; and PORT AUTHORITY TRANS-HUDSON CORP. *v.* FOSTER. C. A. 2d Cir. Certiorari granted. Reported below: 873 F. 2d 628 (first case); 873 F. 2d 633 (second case).

No. 89–390. PENSION BENEFIT GUARANTY CORPORATION *v.* LTV CORP. ET AL. C. A. 2d Cir. Motion of Armco et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 875 F. 2d 1008.

Certiorari Denied

No. 88–1805. EASTERN NEBRASKA COMMUNITY OFFICE OF RETARDATION ET AL. *v.* GLOVER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 867 F. 2d 461.

No. 88–2122. EHRSAM *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 355 Pa. Super. 40, 512 A. 2d 1199.

No. 88–7409. PRINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1379.

No. 88–7511. CHAPMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1326.

No. 88–7566. BRETT, AKA WILSON *v.* UNITED STATES; and

No. 88–7586. GREY, AKA GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 1365.

No. 89–39. MEROS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1304.

No. 89–59. SPIGAROLO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 210 Conn. 359, 556 A. 2d 112.

No. 89–78. ARZOLA-AMAYA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1504.

No. 89–90. JUNGEN, ADMINISTRATRIX OF THE ESTATE OF JUNGEN, ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 94 Ore. App. 101, 764 P. 2d 938.

No. 89–170. SOSEBEE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 190 Ga. App. 746, 380 S. E. 2d 464.

No. 89–171. DICARLANTONIO *v.* UNITED STATES; and
No. 89–5641. PRAYSO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 870 F. 2d 1058.

No. 89–177. AETNA CASUALTY & SURETY CO. *v.* MCMASTER. Ct. App. La., 5th Cir. Certiorari denied.

No. 89–194. VANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 572.

No. 89–200. OFMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1021.

No. 89–201. DEAS *v.* LEVITT, NEW YORK CITY PERSONNEL DIRECTOR, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 73 N. Y. 2d 525, 539 N. E. 2d 1086.

No. 89–211. SOUTHERN ELECTRICAL RETIREMENT FUND *v.* CUSTER. Ct. App. Tenn. Certiorari denied. Reported below: 776 S. W. 2d 92.

No. 89–212. 57,261 ITEMS OF DRUG PARAPHERNALIA ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 955.

No. 89–216. LAVERY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 871 F. 2d 1181.

No. 89–220. SECRIST *v.* HARKIN, UNITED STATES SENATOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 874 F. 2d 1244.

No. 89-272. LITTMAN, INDIVIDUALLY AND AS MAYOR OF THE TOWNSHIP OF MILLSTONE, NEW JERSEY, ET AL. *v.* GIMELLO, EXECUTIVE DIRECTOR, NEW JERSEY HAZARDOUS WASTE SITING COMMISSION, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 115 N. J. 154, 557 A. 2d 314.

No. 89-276. ENGLAND *v.* KING, COMMISSIONER, SOCIAL SECURITY ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 427.

No. 89-286. ARGUBRIGHT ET AL. *v.* BEECH AIRCRAFT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 764.

No. 89-288. DOUBLETREE ET AL. *v.* HAGER, COMMISSIONER OF INSURANCE OF IOWA, AS LIQUIDATOR OF IOWA NATIONAL MUTUAL INSURANCE CO. Sup. Ct. Iowa. Certiorari denied. Reported below: 440 N. W. 2d 603.

No. 89-298. DOWNING ET AL. *v.* CITY OF URBANA EX REL. NEWLIN, DIRECTOR OF LAW. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 3d 109, 539 N. E. 2d 140.

No. 89-331. CANO *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 543 So. 2d 724.

No. 89-334. ORTEGA *v.* CITY OF KANSAS CITY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 2d 1497.

No. 89-339. STEELE *v.* NOEL ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 98, 531 N. Y. S. 2d 511.

No. 89-351. TOWNSHIP OF KENNEDY *v.* KENVUE DEVELOPMENT, INC., ET AL. Pa. Commw. Ct. Certiorari denied.

No. 89-354. BROWN, PERSONAL REPRESENTATIVE OF THE ESTATE OF SWAN *v.* LAITNER ET AL. Ct. App. Mich. Certiorari denied.

No. 89-355. MOORE *v.* ORLEANS PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 119.

No. 89-356. CICIRELLO *v.* NEW YORK TELEPHONE CO. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 855.

No. 89–357. ROSS *v.* MIDWEST COMMUNICATIONS, INC., DBA WCCO TELEVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 870 F. 2d 271.

No. 89–359. STEWART *v.* PEARSON LUMBER CO. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89–363. SMILE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 89–374. RAY *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1088.

No. 89–375. TORCASO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–376. GENERAL DYNAMICS CORP. *v.* TREVINO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 865 F. 2d 1474.

No. 89–380. CALDWELL *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 10th Cir. Certiorari denied.

No. 89–381. MAINE *v.* WING ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 559 A. 2d 783.

No. 89–382. SMITH ET AL. *v.* KENTUCKY DEMOCRATIC PARTY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1029.

No. 89–384. BROWN ET AL. *v.* 1250 TWENTY-FOURTH STREET ASSOCIATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–389. MCDONNELL *v.* EPISCOPAL DIOCESE OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 191 Ga. App. 174, 381 S. E. 2d 126.

No. 89–392. BROWN ET AL. *v.* 1250 TWENTY-FOURTH STREET ASSOCIATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–395. DOW CHEMICAL CO. *v.* GREENHILL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1428.

No. 89–396. WIGGINS ET AL. *v.* FIRESTONE TIRE & RUBBER CO. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 105.

No. 89–398. COFFIN *v.* JACKSON, CHAIRMAN, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 314.

No. 89–399. KRUPA *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 750 S. W. 2d 258.

No. 89–402. GUINNANE *v.* CITY AND COUNTY OF SAN FRANCISCO PLANNING COMMISSION ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 209 Cal. App. 3d 732, 257 Cal. Rptr. 742.

No. 89–404. MAGGIO, DBA PATCHOGUE NURSING CENTER *v.* LOCAL 1199, DRUG, HOSPITAL & HEALTH CARE EMPLOYEES UNION, R. W. D. S. U., AFL–CIO. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1319.

No. 89–410. CHRISTENSEN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 439 N. W. 2d 389.

No. 89–414. CASTELLA *v.* LONG, COMMANDER, ARMY AND AIR FORCE EXCHANGE SERVICE, UNITED STATES DEPARTMENT OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 872.

No. 89–415. BROOKS *v.* TOWN OF ASHLAND. Ct. App. Va. Certiorari denied.

No. 89–416. PARTEN *v.* FORD MOTOR CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–417. NEW JERSEY *v.* BOLTE. Sup. Ct. N. J. Certiorari denied. Reported below: 115 N. J. 579, 560 A. 2d 644.

No. 89–423. E. LAURSENS MASKINFABRIK A/S *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–425. CONSTANT *v.* HITACHI AMERICA, LTD., ET AL. C. A. Fed. Cir. Certiorari denied.

No. 89–426. MCGEE *v.* TREHARNE, PUBLIC GUARDIAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–428. MULLEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1448.

No. 89–437. DIEFENBACH ET UX. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 53 Wash. App. 1066.

No. 89–439. DAVIS OIL CO. ET AL. *v.* MILLS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 774.

No. 89–445. BRUCE *v.* HARLAN & HARLAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–451. WRENN *v.* STONE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 1089.

No. 89–452. ICG PETROLEUM, INC., ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 883 F. 2d 80.

No. 89–460. MARATHON OIL CO. ET AL. *v.* MCMORAN OFFSHORE EXPLORATION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 1214.

No. 89–462. LIVERA ET AL. *v.* SMALL BUSINESS ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 1186.

No. 89–467. MULLEN *v.* MAXWELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 872 F. 2d 418.

No. 89–470. KAYZAKIAN *v.* BUCK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1258.

No. 89–493. OLITT *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 145 App. Div. 2d 273, 538 N. Y. S. 2d 537.

No. 89–498. HELLENIC REPUBLIC ET AL. *v.* RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 574.

No. 89–512. TEARNEY *v.* ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1451.

No. 89–518. PILASKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 817.

No. 89–539. ONDRIZEK ET UX., INDIVIDUALLY AND AS GUARDIANS FOR ONDRIZEK ET AL. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1280.

No. 89–541. NEDZA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 2d 896.

No. 89–5062. ADAMS *v.* JOHN, SHERIFF OF NAMAHA COUNTY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–5088. BRITSON *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 263.

No. 89–5101. BRUNER *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 531.

No. 89–5109. MACK *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89–5135. CHAMBERS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 274.

No. 89–5151. LECRONE, EXECUTRIX OF THE ESTATE OF LECRONE *v.* FEDERAL NATIONAL MORTGAGE ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 868 F. 2d 190.

No. 89–5183. ULFERTS *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 89–5280. ALSTON *v.* DUBOIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1488.

No. 89–5357. LEBBOS *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–5372. LAWRENCE *v.* UNITED STATES ARMY (FORT HOOD). C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 412.

No. 89–5373. LAWRENCE *v.* UNITED STATES ARMY (TACOM). C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 414.

No. 89–5401. BENSON *v.* LIVESAY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 861.

No. 89–5414. STEPHENS *v.* SULLIVAN, SECRETARY, HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1389.

No. 89–5428. SPYCHALA *v.* RUSHEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 430.

No. 89–5439. CLARK *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1024.

No. 89–5473. GILLES *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 531 N. E. 2d 220.

No. 89–5475. BLACKMON, AKA DENSON *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 164.

No. 89–5479. MURRAY *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–5481. TURNER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 128 Ill. 2d 540, 539 N. E. 2d 1196.

No. 89–5487. MANTER ET AL. *v.* TOWN OF FAYETTE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 556 A. 2d 665.

No. 89–5488. GOTTLIEB *v.* ABARIS BOOKS, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5489. TUCKER *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5492. EVANS *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5498. PRICE *v.* PRICE. Cir. Ct. Mercer County, W. Va. Certiorari denied.

No. 89–5499. PRENZLER *v.* COUNTY OF ORANGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 816.

No. 89–5504. FREIBERG *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 282, 540 N. E. 2d 1289.

No. 89–5505. CHAIRES *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 89–5506. HAKIM *v.* DEPARTMENT OF CIVIL RIGHTS ET AL. Ct. App. Mich. Certiorari denied.

No. 89–5509. THOMPSON *v.* COLLINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 89–5516. FIGUEROA ET AL. *v.* CHARLES ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5517. BYRD *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5518. WHITE *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–5520. RIVERS *v.* TURNER, SUPERINTENDENT, GLADES CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 771.

No. 89–5521. STUBBINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 42.

No. 89–5522. OLIM *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5524. WILLOUGHBY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89–5526. LINTICUM *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5528. BROOKS *v.* JOHNSON & JOHNSON, INC. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 309.

No. 89–5529. FRANCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 1436.

No. 89–5531. ZARRILLI *v.* MARINO. App. Ct. Mass. Certiorari denied. Reported below: 26 Mass. App. 1121, 533 N. E. 2d 654.

No. 89–5533. OSSANDON ET AL. *v.* SWISS BANK CORP. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1319.

No. 89–5537. DENTON *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 144.

No. 89–5538. BRAMLETT *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 2d 644.

No. 89–5541. CARPENTER *v.* PHILIPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1024.

No. 89–5549. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1299.

No. 89–5551. BONDARENKO *v.* BINDERUP ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–5554. PEREA *v.* MONDRAGON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–5555. MANNING *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 418.

No. 89–5560. COULTER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 89–5563. FIXEL *v.* NEVADA SUPREME COURT ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1030, 810 P. 2d 324.

No. 89–5564. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–5565. SMITH *v.* LYNAUGH. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 971.

No. 89–5566. AUSTIN *v.* BERRYMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 786.

No. 89–5567. GAROUX *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–5570. MAY *v.* CHALLENGER COMMUNICATIONS SYSTEMS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 865.

No. 89–5572. WARMACK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 317.

No. 89–5574. PICKETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 550 So. 2d 1093.

No. 89–5576. GALA *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1445.

No. 89–5579. GALLARDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5581. OXBORROW *v.* EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 2d 1395.

No. 89–5585. HALL *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 565 A. 2d 280.

No. 89–5602. WILLIAMS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1129.

No. 89–5608. ABDUL-AKBAR *v.* WATSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5611. JURICH *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 89–5613. LOCKHART *v.* ROLLING ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5619. HEDLUND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 77.

No. 89–5627. STRICKLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 861.

No. 89–5631. GOSHO-KIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89–5640. READ *v.* PROTHONOTARY, NEW CASTLE COUNTY, DELAWARE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 512.

No. 89–5645. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1072.

No. 89–5649. ERLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89–5653. URREGO-LINARES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 1234.

No. 89–5660. CARWILE *v.* SMITH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 874 F. 2d 382.

No. 89–5664. OAKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1386.

No. 89–5665. THORNLEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 89–5667. MARQUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 895.

No. 89–5678. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 89–5681. SANTIAGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1386.

No. 89–5685. ABDUL-AKBAR, AKA DAVIS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5708. LAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 1085.

No. 89–5711. USAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89–5714. HINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 881 F. 2d 844.

No. 89–5717. SHAH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 1322.

No. 89–5719. GRANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 882 F. 2d 699.

No. 89–5721. IZQUIERDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1385.

No. 89–5722. FAZZINO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1390.

No. 89–5730. PORTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 881 F. 2d 878.

No. 88–1449. KOREAN AIR LINES *v.* MACNAMARA; and
No. 88–1551. MACNAMARA *v.* KOREAN AIR LINES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 863 F. 2d 1135.

No. 89–383. HANSON *v.* ARROWSMITH ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 872 F. 2d 745.

No. 89–45. HAWAII *v.* ROMAN. Sup. Ct. Haw. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 70 Haw. 351, 772 P. 2d 113.

No. 89–187. MCCORMICK, WARDEN, ET AL. *v.* COLEMAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 874 F. 2d 1280.

No. 89–247. COLORADO *v.* LACY. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 775 P. 2d 1.

No. 89–168. REXALL DRUG CO. *v.* TIGUE ET AL.;
No. 89–204. E. R. SQUIBB & SONS, INC. *v.* HYMOWITZ ET AL.; E. R. SQUIBB & SONS, INC. *v.* TIGUE ET AL.; E. R. SQUIBB & SONS, INC. *v.* DOLAN ET AL.; and
No. 89–397. ELI LILLY & CO. *v.* HYMOWITZ ET AL.; and ELI LILLY & CO. *v.* DOLAN ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE O'CONNOR and JUSTICE SCALIA took no part in the consideration or decision of these petitions. Reported below: 73 N. Y. 2d 487, 539 N. E. 2d 1069.

No. 89–365. POLYAK *v.* STACK ET AL. C. A. 6th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari and to consolidate with other cases denied. Certiorari denied. Reported below: 871 F. 2d 1088.

No. 89-5106. HERRERA *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 869 F. 2d 1490.

No. 89-5385. GATES *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;

No. 89-5433. LILES *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 89-5510. RUTHERFORD *v.* FLORIDA. Sup. Ct. Fla.;

No. 89-5535. FERGUSON *v.* SNYDER, CIRCUIT JUDGE FOR THE ELEVENTH JUDICIAL CIRCUIT. Sup. Ct. Fla.;

No. 89-5547. ANDREWS *v.* BARNES, WARDEN. Sup. Ct. Utah;

No. 89-5548. HALLFORD *v.* ALABAMA. Sup. Ct. Ala.;

No. 89-5589. FITZGERALD *v.* THOMPSON, WARDEN. Ct. App. Va.; and

No. 89-5741. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 89-5385, 863 F. 2d 1492; No. 89-5510, 545 So. 2d 853; No. 89-5535, 548 So. 2d 662; No. 89-5547, 779 P. 2d 228; No. 89-5548, 548 So. 2d 547; No. 89-5589, 6 Va. App. 38, 366 S. E. 2d 615; No. 89-5741, 774 S. W. 2d 163.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89-5503. LYNN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 543 So. 2d 704.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to determine whether a prosecutor's reliance on a nonracial criterion in exercising his peremptory jury challenges violates the Equal Protection Clause where that criterion is highly correlated to race and the

bias that the prosecutor seeks to exclude through the use of that criterion could easily have been discovered on *voir dire*.

Petitioner Frederick Lynn, an Afro-American, was convicted of murder by an all-white jury and sentenced to death. During *voir dire*, the prosecutor exercised 11 of his 14 peremptory challenges to remove all of the potential Afro-American jurors. The crime occurred in Barbour County, Alabama, a small community with approximately equal white and Afro-American populations. General Population Characteristics, Alabama, Census of Population 2–15 (1980) (13,693 whites, 11,003 Afro-Americans). Certain neighborhoods within the community are populated predominately by people of color.

While Lynn's appeal was pending, this Court lowered the threshold showing required for a criminal defendant to establish a prima facie case of purposeful discrimination in jury selection. *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). To make out such a case, a defendant must establish first that he is a member of a cognizable racial group and that the prosecutor has acted to remove members of that group from the venire; second, that the procedure used by the State permits those "who are of a mind to discriminate" to do so; and third, that the facts and circumstances of the case raise the inference that the State acted in a discriminatory manner. *Id.*, at 96. To rebut a prima facie case of racial discrimination, the prosecutor must offer a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)). We subsequently determined that the ruling in *Batson* applies retroactively to state convictions pending on direct review at the time of the *Batson* decision. *Griffith* v. *Kentucky*, 479 U. S. 314 (1987).

The Alabama Court of Criminal Appeals remanded Lynn's case to the trial court to conduct an evidentiary hearing on his *Batson* claim. At that hearing, the prosecutor gave a juror-by-juror explanation of his peremptory strikes. The prosecutor stated that he exercised his fourth strike to exclude an Afro-American juror that "live[d] on the Gammage Road in an area where the defendant, Frederick Lynn, was living at the time of this crime, and also where . . . the defendant's grandmother and aunt . . . have lived for numerous years. I felt that friendship would possibly be there that would bias [the juror], and for that reason struck him."

App. 5 to Pet. for Cert. 7. The prosecutor indicated that he struck another juror on similar grounds:

> "She also lives on Gammage Road and was a neighbor to [defendant's grandmother] and also [defendant's aunt], and also was living in close proximity to the defendant who was living with his grandmother and aunt at the time of the crime. We felt the *possibility* of knowing these people might affect her fairness, and for that reason we struck her." *Id.*, at 11 (emphasis added).

On cross-examination, the prosecutor stated that the area along Gammage Road is populated primarily by people of color. *Id.*, at 20.

The trial court determined that these explanations rebutted petitioner's prima facie case of discrimination in jury selection. The Alabama Court of Criminal Appeals, applying a "clear error" standard to the trial court's determination, affirmed in a split decision. *Ex parte Lynn*, 543 So. 2d 709 (Ala. 1988).

In a small community with racially identifiable neighborhoods, an individual's address closely corresponds to his or her race. In this case, the prosecutor justified two of his strikes on the possibility that the challenged venirepersons "might" have known persons connected with or interested in the trial merely because they lived in the same neighborhood. Yet the prosecutor did not ask these potential jurors whether they *actually* knew anyone involved in the trial, although he had ample opportunity to do so on *voir dire*. Such an inquiry is a standard part of *voir dire* practice. In fact, if the prosecutor's true concern was the challenged jurors' familiarity with persons interested in the trial's outcome, he could have established the validity of that concern and struck such jurors for *cause*, preserving the State's peremptory strikes. His failure to do so suggests that the proxy for bias on which he actually relied was not place of residence but race.

Mere place of residence, or any other factor closely related to race, should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on *voir dire* that the challenged venirepersons actually entertain the bias underlying the use of that factor. This is true particularly when, as in this case, the prosecutor can easily ascertain the existence of the alleged bias without use of the overly broad proxy for bias.

To hold otherwise would render *Batson*'s protections against race discrimination in jury selection illusory.

Accordingly, I would find that the prosecutor's uncorroborated suspicions of bias on the part of two challenged venirepersons insufficient to rebut the prima facie case of discrimination in this case. A *Batson* violation occurs when a prosecutor strikes *any* juror on the basis of race. *Batson*, *supra*, at 99, n. 22 ("The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race"). I dissent.

Rehearing Denied

No. 88–5032. RUIZ *v.* CALIFORNIA, 488 U. S. 871; and

No. 88–6190. WILLIAMS *v.* OHIO, 489 U. S. 1040. Motions for leave to file petitions for rehearing denied.

NOVEMBER 6, 1989

Certiorari Granted—Vacated and Remanded

No. 89–401. WECHT, PRESIDENT OF THE ALLEGHENY COUNTY BOARD OF PRISON INSPECTORS, ET AL. *v.* INMATES OF THE ALLEGHENY COUNTY JAIL ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *University of Texas* v. *Camenisch*, 451 U. S. 390 (1981). Reported below: 874 F. 2d 147.

Miscellaneous Orders

No. — — ——. RAMACHANDRAN *v.* SECRETARY OF THE NAVY. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. STOCKS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BLACKMUN dissents and would grant the motion.

No. A–62 (89–243). ELI LILLY & CO. *v.* MEDTRONIC, INC. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 889.] Application for recall and stay of mandate of the United States Court of Appeals for the Federal Circuit, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

No. A–166 (89–5728). PREUSS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–300 (88–2043). BALILES, GOVERNOR OF VIRGINIA, ET AL. *v.* VIRGINIA HOSPITAL ASSN. C. A. 4th Cir. [Certiorari granted, *ante*, p. 808.] Application for stay of District Court proceedings, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–814. IN RE DISBARMENT OF BERNSTEIN. It is ordered that Zale A. Bernstein, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–815. IN RE DISBARMENT OF SHIMEK. It is ordered that Paul Shimek, Jr., of Pensacola, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–816. IN RE DISBARMENT OF CHANDLER. It is ordered that Robert Thomas Chandler, of Spokane, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–817. IN RE DISBARMENT OF SINGER. It is ordered that Phillip Singer, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–818. IN RE DISBARMENT OF SAUL. It is ordered that Edwin S. Saul, of Encino, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–819. IN RE DISBARMENT OF CHANG. It is ordered that Timothy Theodore Chang, of El Segundo, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–820. IN RE DISBARMENT OF MCDONNELL. It is ordered that John Joseph McDonnell, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, return-

able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–821. IN RE DISBARMENT OF ELLIOTT. It is ordered that Alfred Elliott, of Overland Park, Kan., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–822. IN RE DISBARMENT OF MASTERS. It is ordered that Alan Masters, of Summit, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–823. IN RE DISBARMENT OF WINTER. It is ordered that Edward John Winter, Jr., of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–824. IN RE DISBARMENT OF HOPP. It is ordered that Kenneth H. Hopp, of Yucaipa, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–825. IN RE DISBARMENT OF KOSLOW. It is ordered that David Solomon Koslow, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–826. IN RE DISBARMENT OF RUDD. It is ordered that Leon J. Rudd, of Boca Raton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–827. IN RE DISBARMENT OF COGHLAN. It is ordered that John P. Coghlan, Jr., of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87-2012. FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. *v.* CITY OF DALLAS ET AL.;

No. 87-2051. M. J. R., INC., ET AL. *v.* CITY OF DALLAS; and

No. 88-49. BERRY ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. [Certiorari granted, 489 U. S. 1051.] Motion of petitioners M. J. R., Inc., et al. for leave to file a supplemental brief after argument granted. Request of petitioners FW/PBS, Inc., et al. for leave to join the supplemental brief granted.

No. 87-2066. W. S. KIRKPATRICK & CO., INC., ET AL. *v.* ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL. C. A. 3d Cir. [Certiorari granted, 492 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88-325. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Sup. Ct. Ark. [Certiorari granted, 488 U. S. 954.] Motion of respondents for leave to file a brief on reargument granted.

No. 88-493. UNIVERSITY OF PENNSYLVANIA *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. [Certiorari granted, 488 U. S. 992 and 490 U. S. 1015.] Motion of President and Fellows of Harvard College for leave to file a brief as *amicus curiae* granted.

No. 88-1503. CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL. Sup. Ct. Mo. [Certiorari granted, 492 U. S. 917.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88-1943. OFFICE OF PERSONNEL MANAGEMENT *v.* RICHMOND. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 806.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88-6546. DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1034.] Motion of Rosebud Sioux Tribe et al. for leave to file a brief as *amici curiae* granted.

No. 88–6613. BOYDE *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 490 U. S. 1097.] Motion for appointment of counsel granted, and it is ordered that Dennis A. Fischer, Esq., of Santa Monica, Cal., be appointed to serve as counsel for petitioner in this case.

No. 88–7164. HORTON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. [Certiorari granted, *ante*, p. 889.] Motion for appointment of counsel granted, and it is ordered that Juliana Drous, Esq., of San Francisco, Cal., be appointed to serve as counsel for petitioner in this case.

No. 88–7194. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, *ante*, p. 889.] Motion for appointment of counsel granted, and it is ordered that Bruce Livingston, Esq., of St. Louis, Mo., be appointed to serve as counsel for petitioner in this case.

No. 89–189. RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JEFFERS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 889.] Motion for appointment of counsel granted, and it is ordered that James S. Liebman, Esq., of New York, N. Y., be appointed to serve as counsel for respondent in this case.

No. 89–641. GARNETT, BY AND THROUGH HIS NEXT FRIEND, SMITH, ET AL. *v.* RENTON SCHOOL DISTRICT NO. 403 ET AL. C. A. 9th Cir. Motion of petitioners to expedite consideration of petition for writ of certiorari denied.

No. 89–5614. HOPKINS *v.* ARIZONA DEPARTMENT OF REAL ESTATE ET AL. Ct. App. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 27, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–584. IN RE MARIK. Petition for writ of habeas corpus denied.

No. 89–5600. IN RE MAKER. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–98. DAVIS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 861 F. 2d 558.

No. 89–474. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY *v.* CORBIN. Ct. App. N. Y. Certiorari granted. Reported below: 74 N. Y. 2d 279, 543 N. E. 2d 714.

No. 89–431. YELLOW FREIGHT SYSTEM, INC. *v.* DONNELLY. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 874 F. 2d 402.

Certiorari Denied

No. 88–2085. LOCAL 30, UNITED SLATE, TILE & COMPOSITION ROOFERS, DAMP & WATERPROOF WORKERS ASSN., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 871 F. 2d 401.

No. 88–7300. CONNER *v.* DIRECTOR, DIVISION OF ADULT CORRECTIONS OF IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 870 F. 2d 1384.

No. 88–7322. STUMPF *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 1271.

No. 88–7477. BENTLEY *v.* CARLSON, FORMER DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1488.

No. 88–7607. JOHNSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–7611. JOHNSTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 2d 589.

No. 89–34. BARRIOS-MORIERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 12.

No. 89–47. COLEMAN ET AL. *v.* YEUTTER, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 2d 604.

No. 89–73. JAFFEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 232.

No. 89–75. PARRILLO *v.* PARRILLO. Sup. Ct. R. I. Certiorari denied. Reported below: 554 A. 2d 1043.

No. 89–127. CASTIGLIONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 73.

No. 89–175. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 817.

No. 89–179. TOWN OF BEECH MOUNTAIN, NORTH CAROLINA, ET AL. *v.* COUNTY OF WATAUGA, NORTH CAROLINA, ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 324 N. C. 409, 378 S. E. 2d 780.

No. 89–196. RAILROAD COMMISSION OF TEXAS *v.* FEDERAL ENERGY REGULATORY COMMISSION; and
No. 89–394. WALKER OPERATING CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 874 F. 2d 1320.

No. 89–237. PAYNE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 863.

No. 89–246. SQUITTIERI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 861.

No. 89–264. DURHAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 868 F. 2d 1010.

No. 89–274. GREENLEAF MOTOR EXPRESS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1027.

No. 89–283. AMY TRAVEL SERVICES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 2d 564.

No. 89–329. NATIONAL TOOL & MANUFACTURING CO., INC. *v.* LEPORE. Sup. Ct. N. J. Certiorari denied. Reported below: 115 N. J. 226, 557 A. 2d 1371.

No. 89–342. SHERMAN *v.* NISSAN MOTOR CORP. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–372. AMANDA ACQUISITION CORP. *v.* UNIVERSAL FOODS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 496.

No. 89–434. JULIEN *v.* BAKER. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 758 S. W. 2d 873.

No. 89–457. MCCLURE ET UX. *v.* JEFFERSON ARMS CORP. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 770 S. W. 2d 406.

No. 89–463. TIERNEY *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 89–466. MAALOUF *v.* KAZAN. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1089.

No. 89–491. AMERICAN INVESTORS OF PITTSBURGH, INC., ET AL. *v.* UNITED STATES; and
No. 89–520. ZYTNICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 1087.

No. 89–495. ALEXANDER *v.* MASSACHUSETTS LABOR RELATIONS COMMISSION. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 404 Mass. 1005, 537 N. E. 2d 139.

No. 89–499. FIRTH ET AL. *v.* SOLGAR MARYLAND REALTY, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1438.

No. 89–509. CITY OF PHILADELPHIA ET AL. *v.* WALMSLEY, ADMINISTRATRIX OF THE ESTATE OF WALMSLEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 546.

No. 89–526. RIVERA DEL SOCORRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 77.

No. 89–587. ROPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 782.

No. 89–5057. VOLANTY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 243.

No. 89–5067. FIELDS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 871 F. 2d 188.

No. 89–5102. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89–5175. MARCO L. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 2d 1121.

No. 89–5191. WILLIAMS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 171 Mich. App. 234, 429 N. W. 2d 649.

No. 89–5304. SEDILLO *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–5348. STURDIVANT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 551 A. 2d 1338.

No. 89–5361. BERTRAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89–5380. BURRELL *v.* STOCK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 867 F. 2d 1427.

No. 89–5403. OBALAJA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 877 F. 2d 174.

No. 89–5532. LAURENCO *v.* SULLIVAN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 862.

No. 89–5571. CHICCO *v.* RADIO STATION WBSM ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–5573. FLEMING *v.* MAKEL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 414.

No. 89–5577. SCRUGGS *v.* MOELLERING ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 870 F. 2d 376.

No. 89–5582. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 89–5583. HARKRIDER *v.* SULLIVAN, SHERIFF OF ARAPAHOE COUNTY, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5588. RODRIGUEZ *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89–5592. ASCH ET UX. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5597. TELEPO *v.* ARNOLD ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5607. LEPISCOPO *v.* MOWRER, JUDGE, DISTRICT COURT OF NEW MEXICO, SECOND JUDICIAL DISTRICT, ET AL. Sup. Ct. N. M. Certiorari denied.

No. 89–5625. OSPINA-VILLA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 885 F. 2d 873.

No. 89–5639. SPARKS *v.* SPARKS. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 768 S. W. 2d 563.

No. 89–5643. DARROMAN *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1432.

No. 89–5646. MYERS *v.* IBERIA PARISH COUNCIL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 971.

No. 89–5652. BIRDWELL *v.* MCMAHON ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5663. GALLARDO ET AL. *v.* QUINLAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 874 F. 2d 186.

No. 89–5668. BOREN, AKA WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 885 F. 2d 873.

No. 89–5671. LOWE *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 62.

No. 89–5673. NIETO *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 879 F. 2d 743.

No. 89–5677. SMITH *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Pa. Commw. Ct. Certiorari denied.

No. 89–5682. SIMMONS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 89-5687. TYREE ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 89-5693. KERRIS *v.* UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT. C. A. 11th Cir. Certiorari denied.

No. 89-5695. CORDERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-5696. RIGDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 774.

No. 89-5716. CORDEIRO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 883 F. 2d 1027.

No. 89-5744. JUSTICE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 664.

No. 89-5750. HIMITOLA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 882 F. 2d 546.

No. 89-5760. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 827.

No. 89-5764. FRITZ *v.* BARKER, JUDGE, KENTUCKY CIRCUIT COURT AT FAYETTE, ET AL. Sup. Ct. Ky. Certiorari denied.

No. 89-5766. MONSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-1042. FERNANDEZ *v.* FERNANDEZ. Sup. Ct. Conn. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 208 Conn. 329, 545 A. 2d 1036.

No. 89-280. ESTATE OF LEAVITT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 875 F. 2d 420.

No. 89-282. COMBINED INSURANCE COMPANY OF AMERICA *v.* AINSWORTH. Sup. Ct. Nev. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 104 Nev. 587, 763 P. 2d 673, and 105 Nev. 237, 774 P. 2d 1003.

No. 89–440. CLARDY, EXECUTRIX OF THE ESTATE OF CLARDY, ET AL. *v.* SANDERS. Sup. Ct. Ala. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 551 So. 2d 1057.

No. 89–441. MENARD-SANFORD ET AL. *v.* A. H. ROBINS CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 880 F. 2d 694.

No. 89–442. ANDERSON ET AL. *v.* AETNA CASUALTY & SURETY CO. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 880 F. 2d 709.

No. 89–456. VINTAGE ENTERPRISES, INC. *v.* JAYE ET UX. Sup. Ct. Ala. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 547 So. 2d 1169.

No. 89–295. STONE *v.* WILLIAMS ET AL. C. A. 2d Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 873 F. 2d 620.

No. 89–5279. WEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 877 F. 2d 281.

No. 89–5634. PERRY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1384.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 88–6895. HEIGHTLAND *v.* UNITED STATES, *ante*, p. 826;
No. 88–7362. MCDONALD *v.* YELLOW CAB METRO, INC., *ante*, p. 833;
No. 88–7364. MARTINEZ *v.* NEW MEXICO ET AL., *ante*, p. 833;
No. 88–7580. MCDONALD *v.* JOHNSON, *ante*, p. 843;
No. 88–7609. MATHEWS *v.* LOUISIANA ET AL., *ante*, p. 844;
No. 88–7622. MCDONALD *v.* TENNESSEE, *ante*, p. 845;

No. 89–5012. STURM *v.* CALIFORNIA, *ante*, p. 856;
No. 89–5027. MCDONALD *v.* METROPOLITAN GOVERNMENT FOR NASHVILLE AND DAVIDSON COUNTY ET AL., *ante*, p. 857;
No. 89–5035. LUCAS *v.* UNITED STATES, *ante*, p. 857;
No. 89–5070. MCDONALD *v.* ONOH, *ante*, p. 859;
No. 89–5172. MOON *v.* NEWSOME ET AL., *ante*, p. 863;
No. 89–5311. PARKER *v.* PARSONS, WARDEN, ET AL., *ante*, p. 883; and
No. 89–5415. CONNELLY *v.* GROSSMAN ET AL., *ante*, p. 870. Petitions for rehearing denied.

No. 88–5861. GUZMAN *v.* CALIFORNIA, 488 U. S. 1050; and
No. 88–5988. IN RE MARTIN, 489 U. S. 1009. Motions for leave to file petitions for rehearing denied.

NOVEMBER 13, 1989

Dismissal Under Rule 53

No. 89–52. UNITED STATES *v.* ALBERTSON. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 277 U. S. App. D. C. 37, 872 F. 2d 472.

Miscellaneous Orders

No. — — ——. FIREY *v.* WASHINGTON ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–299 (89–555). MUSSLEWHITE *v.* STATE BAR OF TEXAS. Sup. Ct. Tex. Application for stay and other relief, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–799. IN RE DISBARMENT OF DAVIS. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D–802. IN RE DISBARMENT OF ROLLMAN. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D–803. IN RE DISBARMENT OF DIRICCO. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D–828. IN RE DISBARMENT OF KAVANAUGH. It is ordered that Michael Joseph Kavanaugh, of Millford, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–829. IN RE DISBARMENT OF ISIS. It is ordered that Herman T. Isis, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–830. IN RE DISBARMENT OF NICHOLSON. It is ordered that Brandt Nicholson, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–831. IN RE DISBARMENT OF BRASS. It is ordered that E. Lawrence Brass, of Hempstead, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–832. IN RE DISBARMENT OF BATKIN. It is ordered that Lewis M. Batkin, of Hempstead, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–833. IN RE DISBARMENT OF LAIRD. It is ordered that Joseph R. Laird, Jr., of Sherman Oaks, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–834. IN RE DISBARMENT OF RAIKOS. It is ordered that John D. Raikos, of Indianapolis, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–835. IN RE DISBARMENT OF THORP. It is ordered that Charles Monroe Thorp III, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Motion of South Carolina for leave to file a rebuttal brief granted. [For earlier order herein, see, *e. g.*, *ante*, p. 802.]

No. 88–1125. HODGSON ET AL. *v.* MINNESOTA ET AL.; and
No. 88–1309. MINNESOTA ET AL. *v.* HODGSON ET AL. C. A. 8th Cir. [Certiorari granted, 492 U. S. 917.] Motion of Abortion Rights Council et al. for leave to consider their brief as *amici curiae* filed in No. 88–790, *Turnock, Director of the Illinois Department of Public Health, et al.* v. *Ragsdale et al.* [probable jurisdiction postponed, 492 U. S. 916], and No. 88–805, *Ohio* v. *Akron Center for Reproductive Health et al.* [probable jurisdiction noted, 492 U. S. 916], filed in these cases granted.

No. 88–1597. BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) ET AL. *v.* MERGENS, BY AND THROUGH HER NEXT FRIEND, MERGENS, ET AL. C. A. 8th Cir. [Certiorari granted, 492 U. S. 917.] Motion of the Solicitor General for divided argument granted.

No. 88–1650. TAFFLIN ET AL. *v.* LEVITT ET AL. C. A. 4th Cir. [Certiorari granted in part, 490 U. S. 1089.] Motion of petitioners for leave to file petition for rehearing of partial denial of petition for writ of certiorari denied.

No. 88–1671. UNITED STATES DEPARTMENT OF LABOR *v.* TRIPLETT ET AL.; and
No. 88–1688. COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR *v.* TRIPLETT ET AL. Sup. Ct. App. W. Va. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 88–1872. RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL.; and
No. 88–2074. FRECH ET AL. *v.* RUTAN ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 807.] Motion of petitioners/cross-respondents to dispense with printing the joint appendix granted.

No. 89–459. DELTA AIR LINES, INC. *v.* ASSOCIATION OF FLIGHT ATTENDANTS, AFL–CIO. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–510. MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS *v.* ALEXANDER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 89–682. COLORADO DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* AMISUB (PSL), DBA AMI ST. LUKE'S HOSPITAL, INC., ET AL. C. A. 10th Cir. Motion of respondents to expedite consideration of petition for writ of certiorari denied.

No. 89–494. IN RE SPARKS. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–255. UNITED STATES *v.* ENERGY RESOURCES CO., INC., ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 871 F. 2d 223.

No. 89–5383. HOWLETT, A MINOR, BY AND THROUGH HOWLETT, HIS MOTHER, NATURAL GUARDIAN, AND NEXT FRIEND *v.* ROSE, AS SUPERINTENDENT OF SCHOOLS FOR PINELLAS COUNTY, FLORIDA, ET AL. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 537 So. 2d 706.

Certiorari Denied

No. 88–2019. PENNSYLVANIA *v.* GIBBS; and
No. 89–134. GIBBS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 520 Pa. 151, 553 A. 2d 409.

No. 88–7549. CARTER *v.* SUPERIOR COURT OF CALIFORNIA, SACRAMENTO COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 88–7626. RIVERA *v.* OROWEAT FOODS CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 89–29. LEWIS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 535 So. 2d 943.

No. 89–155. HORNER *v.* UNITED STATES PAROLE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 870 F. 2d 1489.

No. 89–205. GUINEY *v.* ROACHE. C. A. 1st Cir. Certiorari denied. Reported below: 873 F. 2d 1557.

No. 89–245. GARCIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 316.

No. 89–290. JONES ET AL. *v.* TRUCK DRIVERS LOCAL UNION NO. 299. C. A. 6th Cir. Certiorari denied. Reported below: 838 F. 2d 856.

No. 89–311. CONSOLIDATED GAS COMPANY OF FLORIDA, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 276 U. S. App. D. C. 358, 871 F. 2d 155.

No. 89–327. LUCAS ET AL. *v.* LLOYD'S LEASING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1447.

No. 89–350. LANTANA CASCADE OF PALM BEACH, LTD. *v.* LANCA HOMEOWNERS, INC. Sup. Ct. Fla. Certiorari denied. Reported below: 541 So. 2d 1121.

No. 89–362. ROE ET AL. *v.* DOE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 543 So. 2d 741.

No. 89–405. MOKI MAC RIVER EXPEDITIONS, INC. *v.* ARIZONA DEPARTMENT OF REVENUE. Ct. App. Ariz. Certiorari denied. Reported below: 160 Ariz. 369, 773 P. 2d 474.

No. 89–422. WILLIAMS *v.* HEALEY. C. A. 2d Cir. Certiorari denied.

No. 89–438. GREG'S HESS STATION, INC. *v.* NEW JERSEY COMMISSIONER OF TRANSPORTATION ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 226 N. J. Super. 256, 543 A. 2d 1050.

No. 89–468. DOUGLAS *v.* LEGAL ETHICS COMMITTEE OF THE WEST VIRGINIA STATE BAR. Sup. Ct. App. W. Va. Certiorari denied.

No. 89–472. WHITE ET AL. *v.* CELOTEX CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 144.

No. 89–477. CHANDLER'S COVE INN, LTD. *v.* HOLLAND, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 890.

No. 89–487. REPUBLIC OF GHANA ET AL. *v.* TREFALCON CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1318.

No. 89–489. SMITH *v.* MASSACHUSETTS INSTITUTE OF TECHNOLOGY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 877 F. 2d 1106.

No. 89–490. JAY *v.* SUCHER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 864.

No. 89–492. NISTANK *v.* KABOLI. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1036, 810 P. 2d 330.

No. 89–500. MILLWRIGHT LOCAL NO. 1079 *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 960.

No. 89–502. WOLFBERG *v.* GREENBERG. C. A. 10th Cir. Certiorari denied.

No. 89–505. THOMPSON *v.* HINTON, JUDGE, FLEMING CIRCUIT COURT. Sup. Ct. Ky. Certiorari denied.

No. 89–507. PACIFIC LIGHTING LAND CO. *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 297.

No. 89–519. BURR ET VIR *v.* HUTHNANCE DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 970.

No. 89–545. BOWLING *v.* BRONNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 123.

No. 89–561. LARAIA *v.* PHILLIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 857.

No. 89–574. MILLER *v.* CITY OF LOCK HAVEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 56.

No. 89–581. CORPORATION OF MERCER UNIVERSITY *v.* UNITED STATES GYPSUM CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 35.

No. 89–614. LOCAL 112, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* BRAY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 112 Wash. 2d 253, 770 P. 2d 634.

No. 89–622. TRIMPER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 460.

No. 89–633. CIVELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 883 F. 2d 191.

No. 89–639. NATIONAL FUNERAL SERVICES, INC. *v.* CAPERTON, GOVERNOR OF WEST VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 136.

No. 89–5006. LOGSDON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 813.

No. 89–5019. GOBER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 89–5095. DAKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 91, 872 F. 2d 1061.

No. 89–5163. WATKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 89–5215. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 973.

No. 89–5241. MOSS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–5244. ERBE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 178 Ill. App. 3d 1161, 551 N. E. 2d 838.

No. 89–5284. CHANNELL, AKA CHANNEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–5431. DELGADO *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 89–5568. ROBINSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 773, 543 N. E. 2d 733.

No. 89–5615. MARTIN *v.* DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1384.

No. 89–5617. CHAPLIN *v.* PRUDENTIAL-BACHE SECURITIES INC. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 304.

No. 89–5618. COLEMAN, AKA WOODSON *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1387.

No. 89–5620. ADAMS *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5623. HARMER *v.* MADISON CIRCUIT COURT ET AL. Sup. Ct. Ind. Certiorari denied.

No. 89–5628. WALLS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 560 A. 2d 1038.

No. 89–5630. EDDLEMON *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 89–5644. ALI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–5647. HOLBROOK *v.* WILLIAMS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 726.

No. 89–5648. ADAMS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5650. FISHER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 89–5651. BANDGREN *v.* MERCURY MORTGAGE CO., INC. C. A. 10th Cir. Certiorari denied.

No. 89–5655. MACGUIRE *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 529 So. 2d 669.

No. 89–5656. MOHR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 89–5657. WHITTAKER *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 892.

No. 89–5658. MOORE *v.* BUTLER COUNTY JAIL ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-5659. PERRINO *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89-5669. SELSOR *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89-5706. TRUJILLO *v.* KERBY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-5724. FIGUEROA *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89-5725. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-5739. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 860.

No. 89-5745. SERRANO SEPULVEDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 89-5751. GARCES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1329.

No. 89-5763. SCHMANKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 1128.

No. 89-5769. LABINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 382.

No. 89-5771. BYRD ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 551 A. 2d 96.

No. 89-5772. LENIS-LLANOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-5774. ACQUISTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1440.

No. 89-5776. MONTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-5783. VILLARREAL-FARIAS *v.* UNITED STATES; and No. 89-5793. RICHARDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 376.

No. 89–5796. MARTINEZ-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1025.

No. 89–5803. ANGUIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 873 F. 2d 1314.

No. 89–5804. CHAFIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 866.

No. 89–5808. MAKRES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1092.

No. 89–5811. SHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1025.

No. 89–5813. WILSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 846.

No. 89–5816. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 1502.

No. 89–5830. TINSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1390.

No. 89–5845. ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 2d 143.

No. 89–228. VOLKSWAGEN OF AMERICA, INC., ET AL. *v.* GIBBS ET AL. Super. Ct. N. J., App. Div. Motion of Product Liability Advisory Council, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 89–449. UNITED SERVICES AUTOMOBILE ASSN. ET AL. *v.* FOSTER, INSURANCE COMMISSIONER OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Motion of Financial Services Council et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 874 F. 2d 926.

No. 89–522. POWELL, COMMISSIONER, DEPARTMENT OF CORRECTIONS, ET AL. *v.* COPPOLA. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 878 F. 2d 1562.

No. 89–5593. RONDON *v.* INDIANA. Sup. Ct. Ind.;
No. 89–5595. HINTON *v.* ALABAMA. Sup. Ct. Ala.;

No. 89–5626. MARTIN *v.* ALABAMA. Sup. Ct. Ala.; and

No. 89–5683. ELLIS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: No. 89–5593, 534 N. E. 2d 719; No. 89–5595, 548 So. 2d 562; No. 89–5626, 548 So. 2d 496; No. 89–5683, 873 F. 2d 830.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–1964. POLYAK *v.* HAMILTON, JUDGE, CHANCERY AND CIRCUIT COURTS OF LAWRENCE COUNTY, *ante*, p. 815;

No. 88–2026. PACYNA *v.* MARSH, SECRETARY OF THE ARMY, ET AL., *ante*, p. 819;

No. 88–5682. LEVITT *v.* UNIVERSITY OF TEXAS AT EL PASO ET AL., 488 U. S. 984;

No. 88–7104. BAKER *v.* UNITED STATES, *ante*, p. 827;

No. 88–7221. IN RE MARTIN, *ante*, p. 806;

No. 88–7291. THOMAS *v.* COWLEY, WARDEN, ET AL., *ante*, p. 831;

No. 88–7359. GIBSON *v.* TURNER, SUPERINTENDENT, RENZ CORRECTIONAL CENTER AT CEDAR CITY, MISSOURI, *ante*, p. 833;

No. 88–7603. HOOPER *v.* DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS, *ante*, p. 844;

No. 89–18. WINER *v.* NIXON, *ante*, p. 847;

No. 89–5031. LAWSON *v.* TANEDO ET AL., *ante*, p. 857;

No. 89–5045. HAZIME *v.* UNITED STATES, *ante*, p. 858;

No. 89–5056. SILVAGGIO *v.* CALIFORNIA, *ante*, p. 895;

No. 89–5210. MARTIN *v.* DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY, INC., ET AL., *ante*, p. 875;

No. 89–5211. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA ET AL., *ante*, p. 876;

No. 89–5216. CAMPBELL *v.* MCCORMICK, WARDEN, *ante*, p. 895;

No. 89–5254. SINGLETON *v.* MCKELLAR, WARDEN, ET AL., *ante*, p. 874; and

No. 89–5462. HARDIN *v.* BOYD CIRCUIT COURT ET AL., *ante*, p. 898. Petitions for rehearing denied.

NOVEMBER 16, 1989

Certiorari Denied

No. 89-5989 (A-371). JULIUS *v.* JONES, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 17, 1989

Miscellaneous Order

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. It is ordered that Robert B. McKay, Esq., of New York, N. Y., Professor Emeritus, New York University School of Law, be appointed Special Master in this case to reopen decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations. He shall have the authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, *ante*, p. 886.]

NOVEMBER 20, 1989

Miscellaneous Order

No. A-377. LANKFORD *v.* IDAHO. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and

by her referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue in effect pending the issuance of the mandate of this Court.

NOVEMBER 22, 1989

Miscellaneous Order

No. A–378 (89–5892). SILVA *v.* CALIFORNIA. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

NOVEMBER 27, 1989

Appeal Dismissed

No. 89–5863. GOUDIE, AKA WEBSTER *v.* GENERAL TELEPHONE COMPANY OF THE SOUTHEAST ET AL. Appeal from Cir. Ct. W. Va., Jefferson County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. D–787. IN RE DISBARMENT OF PRANTIL. Disbarment entered. [For earlier order herein, see 490 U. S. 1062.]

No. D–836. IN RE DISBARMENT OF EVANS. It is ordered that James Clifford Evans, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–837. IN RE DISBARMENT OF MARCONE. It is ordered that Frank J. Marcone, of Springfield, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–838. IN RE DISBARMENT OF ADELMAN. It is ordered that Barry Leonard Adelman, of Philadelphia, Pa., be suspended

from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–839. IN RE DISBARMENT OF HIGGINBOTHAM. It is ordered that William S. Higginbotham, of Athens, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–840. IN RE DISBARMENT OF PEMBERTON. It is ordered that Charles A. Pemberton, of Decatur, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–841. IN RE DISBARMENT OF FARLEY. It is ordered that Milliard Eugene Farley, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Third motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded $97,843.24 to be paid to him 20 percent by the United States and 40 percent each by the States of Nebraska and Wyoming. [For earlier order herein, see, *e. g.*, 492 U. S. 903.]

No. 87–6700. SELVAGE *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. [Certiorari granted, *ante*, p. 888.] Motion of petitioner to suspend briefing and further consideration denied. Motion of petitioner to certify question to Court of Criminal Appeals of Texas denied.

No. 88–325. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Sup. Ct. Ark. [Certiorari granted, 488 U. S. 954.] Motion of petitioners for leave to file a supplemental brief on reargument granted.

No. 88–1503. CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF

HEALTH, ET AL. Sup. Ct. Mo. [Certiorari granted, 492 U. S. 917.] Motion of respondent Thad C. McCanse, Guardian ad Litem, for divided argument denied.

No. 88–1595. KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL.; and

No. 88–1771. BONJORNO ET AL. *v.* KAISER ALUMINUM & CHEMICAL CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 491 U. S. 903.] Motion of respondents/cross-petitioners, Joseph Bonjorno et al., to open oral argument and to present a summary outline of issues for use in determining the order of oral argument denied.

No. 88–1897. MICHIGAN DEPARTMENT OF STATE POLICE ET AL. *v.* SITZ ET AL. Ct. App. Mich. [Certiorari granted, *ante*, p. 806.] Motion of Insurance Institute for Highway Safety et al. for leave to file a brief as *amici curiae* granted.

No. 88–1905. KELLER ET AL. *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. [Certiorari granted, *ante*, p. 806.] Motion of Trayton L. Lathrop for leave to file a brief as *amicus curiae* granted.

No. 88–2123. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 89–386. PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY; and PORT AUTHORITY TRANS-HUDSON CORP. *v.* FOSTER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 932.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 89–560. IN RE NORTON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied. (See also No. 89–5863, *supra.*)

No. 89–17. PROFESSIONAL CABIN CREW ASSN. ET AL. *v.* NATIONAL MEDIATION BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 21, 872 F. 2d 456.

No. 89–33. BOBBITT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89-40. CALIFORNIA *v.* BOYER. Sup. Ct. Cal. Certiorari denied. Reported below: 48 Cal. 3d 247, 768 P. 2d 610.

No. 89-242. PINCHAM *v.* ILLINOIS JUDICIAL INQUIRY BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 1341.

No. 89-244. PELLEGRINI *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 86, 539 N. E. 2d 514.

No. 89-267. CHRISTOPHER *v.* MADISON HOTEL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 875 F. 2d 314.

No. 89-302. HAMPTON ET AL. *v.* TENNESSEE BOARD OF LAW EXAMINERS ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 770 S. W. 2d 755.

No. 89-323. WELEX *v.* DOLE, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied.

No. 89-349. CHILA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 1015.

No. 89-358. GILL *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89-368. MERCK & CO., INC. *v.* BIOCRAFT LABORATORIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 874 F. 2d 804.

No. 89-370. PRICE *v.* DIGITAL EQUIPMENT CORP. C. A. 5th Cir. Certiorari denied.

No. 89-377. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, ET AL. *v.* LOWE EXCAVATING CO. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 180 Ill. App. 3d 39, 535 N. E. 2d 1065.

No. 89-379. COONAN ET UX. *v.* UNITED STATES;
No. 89-5497. RITTER *v.* UNITED STATES;
No. 89-5512. BOKUN *v.* UNITED STATES; and
No. 89-5601. MCELROY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 891.

No. 89-385. BARR *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 36.

No. 89–388. CITY OF NEW YORK ET AL. *v.* SEAWALL ASSOCIATES ET AL.;

No. 89–403. COALITION FOR THE HOMELESS *v.* SEAWALL ASSOCIATES ET AL.; and

No. 89–552. WILKERSON ET AL. *v.* SEAWALL ASSOCIATES ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 92, 542 N. E. 2d 1059.

No. 89–409. CITY OF MILWAUKEE ET AL. *v.* YEUTTER, SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 540.

No. 89–412. HEARN ET AL. *v.* CITY OF OVERLAND PARK, KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 244 Kan. 638, 772 P. 2d 758.

No. 89–447. PENCE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF PENCE *v.* BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 56 Ohio App. 3d 176, 565 N. E. 2d 877.

No. 89–448. WELCH, EXECUTIVE DIRECTOR, SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL. *v.* COAKLEY. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 304.

No. 89–476. TOWN OF HULL, MASSACHUSETTS, ET AL. *v.* MILLER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 878 F. 2d 523.

No. 89–517. WOODS *v.* HUDAK. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 857.

No. 89–528. TOWNE *v.* TOMLIN PROPERTIES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1433.

No. 89–529. JAKOBOWSKI *v.* DUBIN. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 856.

No. 89–533. DENMAN RUBBER MANUFACTURING CO. ET AL. *v.* HALL. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 893.

No. 89–537. CAMP *v.* NEW YORK UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 304.

No. 89–540. DAVOLI, ASSISTANT SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. *v.* FRAZIER. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 820.

No. 89–543. SLAYTON *v.* BECHTEL POWER CORP. ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–546. MORRIS *v.* WACKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 56.

No. 89–547. OHIO *v.* BOOHER. Ct. App. Ohio, Defiance County. Certiorari denied. Reported below: 54 Ohio App. 3d 1, 560 N. E. 2d 786.

No. 89–548. BILECKI ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 1128.

No. 89–550. CANTRELL ET VIR *v.* BUCHANAN. Ct. App. Tenn. Certiorari denied.

No. 89–555. MUSSLEWHITE *v.* STATE BAR OF TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 89–559. ATKINS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 89–570. MORRIS *v.* MASSACHUSETTS BOARD OF REGISTRATION IN MEDICINE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 103, 539 N. E. 2d 50.

No. 89–576. FREY, DIRECTOR, METROPOLITAN CORRECTIONS DEPARTMENT, ET AL. *v.* MASTERS. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1248.

No. 89–577. WALDO R., INC., ET AL. *v.* PIPEFITTERS HEALTH AND WELFARE TRUST ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 872 F. 2d 815.

No. 89–583. WILSON ET AL. *v.* ARMSTRONG WORLD INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 869.

No. 89–585. MCDONALD ET AL. *v.* GOTTLIEB ET AL. Ct. App. Wash. Certiorari denied. Reported below: 53 Wash. App. 1031.

No. 89–586. MALINAK *v.* MATELICH. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 203, 772 P. 2d 319.

No. 89–615. REARDON ET AL. *v.* REARDON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 57.

No. 89–620. ELLIOTT *v.* ANDERSON. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 555 A. 2d 1042.

No. 89–626. FOX ET AL. *v.* CONNECTICUT. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 125.

No. 89–629. STORINO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 380.

No. 89–652. SAFIR *v.* UNITED STATES LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–665. YAZDCHI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 166.

No. 89–668. POWELL ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89–681. JASON *v.* ROADWAY EXPRESS, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–685. HUBBARD CHEVROLET CO. *v.* GENERAL MOTORS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 873.

No. 89–705. MARIORENZI *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 320.

No. 89–706. CORBETT *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 253.

No. 89–5185. BANKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–5272. WOODRUFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1334.

No. 89–5275. MORRIS *v.* GLUCH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–5310. MCCOLLUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 820.

No. 89–5343. McCROSKEY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1079.

No. 89–5353. SALAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 530.

No. 89–5355. HEADLEE *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 869 F. 2d 548.

No. 89–5382. ALEXANDER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 868 F. 2d 492.

No. 89–5413. WATSON *v.* BROWN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 1494.

No. 89–5419. DAVIS *v.* ESTELLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1485.

No. 89–5420. BRADEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 387.

No. 89–5502. LOPEZ-TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 876 F. 2d 4.

No. 89–5562. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 817.

No. 89–5661. DEBROSSE *v.* OHIO. Ct. App. Ohio, Miami County. Certiorari denied.

No. 89–5662. SASSOWER *v.* DILLON ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 89–5670. BARELA *v.* BAKER, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied.

No. 89–5672. POLUMBO *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 89–5674. LIGHTSEY *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 89–5675. GRIBBLE *v.* LIVESAY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 864.

No. 89–5679. HOWARD *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5690. HAMILTON *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–5692. O'CONNOR ET UX. *v.* LAWRY. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 1042, 810 P. 2d 336.

No. 89–5694. DILLON *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89–5698. KIRKMAN *v.* SUTTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1439.

No. 89–5699. SHANNON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 212 Conn. 387, 563 A. 2d 646.

No. 89–5702. GRAY *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 878 F. 2d 384.

No. 89–5703. DEMOS *v.* SUPREME COURT OF WASHINGTON (two cases). Sup. Ct. Wash. Certiorari denied.

No. 89–5709. PASTRANA *v.* PUGET SOUND NAVAL SHIPYARD. C. A. 9th Cir. Certiorari denied.

No. 89–5710. THOMAS *v.* KANSAS STATE UNIVERSITY ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5713. EASON *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89–5718. RICHARDSON *v.* ARNOLD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 75.

No. 89–5726. MOORE *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 776 S. W. 2d 933.

No. 89–5728. PREUSS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 89–5731. SPYCHALA *v.* RUSHEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 2d 64.

No. 89–5733. KUCHER *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 89–5735. FAIR *v.* BRONSON, WARDEN. Sup. Ct. Conn. Certiorari denied. Reported below: 211 Conn. 398, 559 A. 2d 1094.

No. 89–5736. KIMELMAN *v.* CITY OF COLORADO SPRINGS ET AL. Ct. App. Colo. Certiorari denied. Reported below: 775 P. 2d 51.

No. 89–5738. BILDER *v.* CITY OF AKRON. Ct. App. Ohio, Summit County. Certiorari denied.

No. 89–5740. GARDNER *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5746. CARMACK *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 2d 64.

No. 89–5748. GALLAGHER *v.* LOGSON-BABICH. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 579.

No. 89–5752. MYLES *v.* CASTLE CONSTRUCTION CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5754. PATE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 177 Ill. App. 3d 1158, 550 N. E. 2d 67.

No. 89–5770. NUNEZ *v.* UNITED STATES;
No. 89–5773. MARTINEZ *v.* UNITED STATES; and
No. 89–5800. NUNEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: No. 89–5770, 877 F. 2d 1470; No. 89–5773, 877 F. 2d 1480; No. 89–5800, 877 F. 2d 1475.

No. 89–5775. IN HO KIM, AKA SANG IN PAK *v.* UNITED STATES; and
No. 89–5891. JONG MUN PARK, AKA JONG SOO KIM, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 878.

No. 89–5778. RADCLIFF *v.* NORTHWEST MANOR, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–5782. FLANERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 863.

No. 89–5790. WATTS *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89–5794. ANDERSON, AKA ALFONSI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 2d 369.

No. 89–5805. PICKENS *v.* MAKEL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 580.

No. 89–5806. LOVETT *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 579.

No. 89–5810. FORERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89–5818. BARTLETT *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1086.

No. 89–5824. AGAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 822.

No. 89–5829. MANTANONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1439.

No. 89–5835. WHITMORE ET AL. *v.* NEW YORK LIFE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–5839. SIERS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 89–5850. MCCARTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 575.

No. 89–5851. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 581.

No. 89–5852. ROSA-IBARRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 895.

No. 89–5854. FAZZINI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 871 F. 2d 635.

No. 89–5858. VOIGT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 877 F. 2d 1465.

No. 89–5860. GAY *v.* ESPOSITO, SUPERINTENDENT, METRO CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 585.

No. 89–5862. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1390.

No. 89–5864. BAKER *v.* UNITED STATES; and SHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 13 (first case); 883 F. 2d 10 (second case).

No. 89–5866. KOHLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5872. AVILA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5880. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5885. BARNETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89–5886. ROGERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–5887. WAGSTAFF-EL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1441.

No. 89–5889. MUSSER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 256, 873 F. 2d 1513.

No. 89–5906. DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 869.

No. 89–515. ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT *v.* TIMOTHY W., BY HIS MOTHER AND NEXT FRIEND, CYNTHIA W. C. A. 1st Cir. Motions of National School Boards Association et al. and National League of Cities et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 875 F. 2d 954.

No. 89–531. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO., DBA MOUNTAIN BELL *v.* DISTRICT COURT, CITY AND

COUNTY OF DENVER, COLORADO, ET AL. Sup. Ct. Colo. Motions of Chevron Corp. and Edison Electric Institute et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 778 P. 2d 667.

No. 89–591. LEE *v.* BIDEN, UNITED STATES SENATOR, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 876 F. 2d 897.

No. 89–5460. ROGERS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–5534. MORALES *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–5575. NOLTE *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 89–5707. MENDYK *v.* FLORIDA. Sup. Ct. Fla.; and
No. 89–5798. BLANKS *v.* KEMP, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 89–5460, 774 S. W. 2d 247; No. 89–5534, 48 Cal. 3d 527, 770 P. 2d 244; No. 89–5707, 545 So. 2d 846.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–5765. FRANZ, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS, ET AL. *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Motion of the parties to consolidate this petition with No. 88–7146, *Whitmore, Individually and as Next Friend of Simmons* v. *Arkansas et al.* [certiorari granted, 492 U. S. 917], denied. Certiorari before judgment denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 88–1708. SPAWR OPTICAL RESEARCH, INC., ET AL. *v.* UNITED STATES, *ante*, p. 809;

No. 88–1966. ZILL *v.* AVIS RENT-A-CAR SYSTEMS, INC., *ante*, p. 816;

No. 88–1979. FLEMING *v.* MOORE ET AL., *ante*, p. 816;

No. 88–2106. ROSENBERG *v.* COMERICA BANK, *ante*, p. 824;

No. 88–2116. JOHNSON *v.* JOHNSON ET AL., *ante*, p. 824;

No. 88–2127. VAHLSING *v.* MAINE, *ante*, p. 825;

No. 88–6850. STREETER *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 826;

No. 88–6976. WOOLWORTH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 827;

No. 88–7139. STUTZMAN *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL., *ante*, p. 828;

No. 88–7180. JARRELLS *v.* GEORGIA, *ante*, p. 874;

No. 88–7204. KERKMAN *v.* UNITED STATES, *ante*, p. 828;

No. 88–7217. GAMES *v.* INDIANA, *ante*, p. 874;

No. 88–7278. DEVINE *v.* HERALD-MAIL CO., *ante*, p. 830;

No. 88–7316. GORMAN *v.* UNITED STATES, *ante*, p. 828;

No. 88–7388. DOE *v.* UNITED STATES, *ante*, p. 906;

No. 88–7418. KELLY *v.* HINES-RINALDI FUNERAL HOME, INC., *ante*, p. 835;

No. 88–7429. ASCH *v.* PHILIPS, APPEL & WALDEN, INC., ET AL., *ante*, p. 835;

No. 88–7435. MARTIN *v.* TOWNSEND ET AL., *ante*, p. 875;

No. 88–7465. UNDERWOOD *v.* INDIANA, *ante*, p. 900;

No. 88–7475. WESTOVER *v.* UNITED STATES, *ante*, p. 837;

No. 88–7491. VAN LEEUWEN ET VIR *v.* UNITED STATES ET AL., *ante*, p. 838;

No. 88–7495. POTTS *v.* GEORGIA, *ante*, p. 876;

No. 88–7504. FORGEY ET UX. *v.* BACA STATE BANK ET AL., *ante*, p. 839;

No. 88–7514. HARNAGE *v.* UNITED STATES, *ante*, p. 839;

No. 88–7597. WRIGHT *v.* UNITED STATES, *ante*, p. 844;

No. 88–7612. KARAAGAC *v.* DISTRICT OF COLUMBIA BOARD OF MEDICINE, *ante*, p. 844;

No. 88–7619. ROBERTSON *v.* CALIFORNIA, *ante*, p. 879;

No. 88–7627. NELSON *v.* INGRAM ET AL., *ante*, p. 845;

No. 89–69. LOVE *v.* UNITED STATES, *ante*, p. 849;

No. 89–74. NOBLE *v.* WATKINS, SECRETARY OF ENERGY, *ante*, p. 890;

No. 89–76. PATNER *v.* COUNTY OF LAKE, *ante*, p. 849;

No. 89–88. WOODWARD *v.* STATE BAR OF GEORGIA ET AL., *ante*, p. 849;

No. 89–105. ROBINSON *v.* QUICK ET AL., *ante*, p. 850;

No. 89–160. O'CONNOR *v.* MULLIGAN, *ante*, p. 853;

No. 89–185. CONNOR *v.* SACHS ET AL., *ante*, p. 854;

No. 89–203. SIEGEL *v.* EDMONDS CO., INC., PROFIT SHARING PLAN ET AL., *ante*, p. 854;

No. 89–249. KENNA *v.* NEW JERSEY, *ante*, p. 855;

No. 89–340. LERMAN *v.* CITY OF PORTLAND, MAINE, *ante*, p. 894;

No. 89–341. GRADER *v.* CITY OF LYNNWOOD, *ante*, p. 894;

No. 89–5038. BROWNLEE *v.* ALABAMA, *ante*, p. 874;

No. 89–5040. THOMPSON *v.* ALABAMA, *ante*, p. 874;

No. 89–5053. BOYD *v.* ALABAMA, *ante*, p. 883;

No. 89–5066. CHURCH *v.* THOMPSON, WARDEN, ET AL., *ante*, p. 859;

No. 89–5081. DAVIS *v.* DAVIS, *ante*, p. 859;

No. 89–5099. KINSMAN *v.* GEORGIA, *ante*, p. 874;

No. 89–5105. HORNE *v.* ALLEN METROPOLITAN HOUSING AUTHORITY, *ante*, p. 860;

No. 89–5143. TOMPKINS *v.* UNIVERSITY OF SOUTH ALABAMA ROTC, MILITARY SCIENCE DEPARTMENT, ET AL., *ante*, p. 862;

No. 89–5157. WASHINGTON *v.* MARTIN ET AL., *ante*, p. 862;

No. 89–5192. TEMPEL *v.* VALLEY HOSPITAL ET AL., *ante*, p. 864;

No. 89–5200. MORRIS *v.* CHRISTIAN HOSPITAL, *ante*, p. 864;

No. 89–5264. RIVA *v.* GETCHELL ET AL., *ante*, p. 866;

No. 89–5298. YANG *v.* MCCARTHY ET AL., *ante*, p. 868;

No. 89–5330. VENERI *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL., *ante*, p. 896;

No. 89–5344. VINSON *v.* WATKINS, *ante*, p. 896;

No. 89–5372. LAWRENCE *v.* UNITED STATES ARMY (FORT HOOD), *ante*, p. 938;

No. 89–5373. LAWRENCE *v.* UNITED STATES ARMY (TACOM), *ante*, p. 938;

No. 89–5386. CASSADY *v.* ADAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF MONTGOMERY COUNTY SCHOOLS, ET AL., *ante*, p. 870;

No. 89–5387. PERKINS *v.* ILLINOIS, *ante*, p. 897;

No. 89–5409. IN RE OGDEN, *ante*, p. 888;

No. 89–5411. IN RE SOBAMOWO, *ante*, p. 888;

No. 89–5530. ZARRILLI *v.* GARRITY ET AL., *ante*, p. 899;
No. 89–5556. BROWN-BEY *v.* UNITED STATES, *ante*, p. 899; and
No. 89–5642. IN RE SPARKS, *ante*, p. 916. Petitions for rehearing denied.

No. 86–1523. CHANDLER *v.* CHANDLER, 481 U. S. 1049; and
No. 87–1689. CHANDLER *v.* CHANDLER ET AL., 486 U. S. 1023. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

No. 89–5271. MARTIN *v.* PENNSYLVANIA STATE REAL ESTATE COMMISSION ET AL., *ante*, p. 883. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

NOVEMBER 29, 1989

Miscellaneous Order

No. A–412 (89–6144). PREJEAN *v.* SMITH, WARDEN, ET AL. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

DECEMBER 1, 1989

Miscellaneous Order

No. 88–790. TURNOCK, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, ET AL. *v.* RAGSDALE ET AL. C. A. 7th Cir. [Probable jurisdiction postponed, 492 U. S. 916.] Joint motion to defer further proceedings in this case granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

DECEMBER 4, 1989

Miscellaneous Orders

No. A–390. CLARK *v.* CLARK ET AL. Sup. Ct. Iowa. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–401. FREEMAN ET AL. *v.* PITTS ET AL. Application for stay of mandate of the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered by JUSTICE KENNEDY on November 22, 1989, is vacated.

No. D–777. IN RE DISBARMENT OF COOPER. Disbarment entered. [For earlier order herein, see 490 U. S. 1016.]

No. D–795. IN RE DISBARMENT OF HELD. Disbarment entered. [For earlier order herein, see 492 U. S. 930.]

No. D–805. IN RE DISBARMENT OF POLLACK. Disbarment entered. [For earlier order herein, see 492 U. S. 940.]

No. D–842. IN RE DISBARMENT OF EISENBERG. It is ordered that Donald S. Eisenberg, of Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–843. IN RE DISBARMENT OF BROWN. It is ordered that Lawrence Brown, of Encino, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–844. IN RE DISBARMENT OF RAY. It is ordered that R. Lewis Ray, of Winston-Salem, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–845. IN RE DISBARMENT OF DAVIS. It is ordered that C. Michael Davis, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–846. IN RE DISBARMENT OF SANCHEZ-NAVARRO. It is ordered that Peter Sanchez-Navarro, Jr., of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for award of interim fees and expenses granted, and the Special Master is awarded a total of $83,082.76 to be paid by Kansas, Colorado, and the United States pursuant to the allocation order filed by the Special Master on October 9, 1989. [For earlier order herein, see, *e. g.*, 489 U. S. 1005.]

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of Minnesota for leave to intervene referred to the Special Master. Motion of California, Michigan, Nebraska, Ohio, and Rhode Island for leave to file complaint in intervention referred to the Special Master. Motion of Colorado for leave to intervene referred to the Special Master. Motion of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire, and West Virginia for leave to file complaint in intervention referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 929.]

No. 88–1872. RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 807.] Motion of Independent Voters of Illinois Independent Precinct Organization et al. for leave to file a brief as *amici curiae* granted.

No. 88–1897. MICHIGAN DEPARTMENT OF STATE POLICE ET AL. *v.* SITZ ET AL. Ct. App. Mich. [Certiorari granted, *ante*, p. 806.] Motions of National Organization of Mothers Against Drunk Driving, Washington Legal Foundation et al., American Alliance for Rights and Responsibilities, Inc., et al., National Governors' Association et al., and Appellate Committee of the California District Attorneys Association for leave to file briefs as *amici curiae* granted.

No. 88–1916. MINNESOTA *v.* OLSON. Sup. Ct. Minn. [Certiorari granted, *ante*, p. 806.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Glenn P. Bruder, Esq., of Edina, Minn., be appointed to serve as counsel for respondent in this case.

No. 88–2043. BALILES, GOVERNOR OF VIRGINIA, ET AL. *v.* VIRGINIA HOSPITAL ASSN. C. A. 4th Cir. [Certiorari granted, *ante*, p. 808.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88-2102. STEWART ET AL. *v.* ABEND, DBA AUTHORS RESEARCH CO. C. A. 9th Cir. [Certiorari granted, *ante*, p. 807.] Motion of Columbia Pictures Industries, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 88-2123. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 807.] Motion of respondent National Treasury Employees Union for divided argument granted.

No. 88-6546. DURO *v.* REINA, CHIEF OF POLICE, SALT RIVER DEPARTMENT OF PUBLIC SAFETY, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL. C. A. 9th Cir. [Certiorari granted, 490 U. S. 1034.] Motion of New Mexico et al. for leave to file a brief as *amici curiae* out of time denied.

No. 88-7351. WALTON *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 808.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 89-61. UNITED STATES *v.* OJEDA RIOS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 889.] Motions for appointment of counsel granted, and it is ordered that Margaret P. Levy, Esq., of Hartford, Conn., be appointed to serve as counsel for respondents in this case.

No. 89-156. PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* DAVENPORT ET UX. C. A. 3d Cir. [Certiorari granted, *ante*, p. 808.] Motions of Council of State Governments et al. and Washington Legal Foundation et al. for leave to file briefs as *amici curiae* granted.

No. 89-593. LIBERTY MUTUAL INSURANCE CO. ET AL. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89-5953. IN RE STULL ET AL. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 88-1260. CITIBANK, N. A. *v.* WELLS FARGO ASIA LTD. C. A. 2d Cir. Certiorari granted. Reported below: 852 F. 2d 657.

No. 89–333. CALIFORNIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 877 F. 2d 743.

No. 89–369. GENERAL MOTORS CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Reported below: 876 F. 2d 1060.

Certiorari Denied

No. 88–7440. JAMESON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1029.

No. 89–284. LOFTUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1021.

No. 89–373. ALABAMA POWER CO. ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 870 F. 2d 892.

No. 89–378. ALABAMA EX REL. SIEGELMAN, ATTORNEY GENERAL OF ALABAMA, ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 1548.

No. 89–411. WISTROM *v.* DULUTH, MISSABE & IRON RANGE RAILWAY CO. Ct. App. Minn. Certiorari denied. Reported below: 437 N. W. 2d 730.

No. 89–418. FRANCO ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1445.

No. 89–419. JOHNSON *v.* DULUTH, MISSABE & IRON RANGE RAILWAY CO. Ct. App. Minn. Certiorari denied. Reported below: 437 N. W. 2d 727.

No. 89–430. NOONS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 153.

No. 89–443. CAJUN ELECTRIC POWER COOPERATIVE, INC. *v.* LOUISIANA PUBLIC SERVICE COMMISSION. Sup. Ct. La. Certiorari denied. Reported below: 544 So. 2d 362.

No. 89–464. WILSON ET AL. *v.* CANTERINO, AKA WILLIAMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 862.

No. 89–482. UNITED STATES *v.* WASHINGTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR WASHINGTON, A MINOR. C. A. 9th Cir. Certiorari denied. Reported below: 868 F. 2d 332.

No. 89–568. CHRYSLER CORP. ET AL. *v.* SMOLAREK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1326.

No. 89–571. ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND *v.* PRESTI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1433.

No. 89–572. HELMSLEY ET AL. *v.* BEAUFORD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 893 F. 2d 1433.

No. 89–578. CAIN *v.* LARSON, POLICE CHIEF, VILLAGE OF HERSCHER, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 1424.

No. 89–580. ABRAMS ET AL. *v.* COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 189, 884 F. 2d 628.

No. 89–582. POTTS ET AL. *v.* ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION. Sup. Ct. Ill. Certiorari denied. Reported below: 128 Ill. 2d 322, 538 N. E. 2d 1140.

No. 89–588. NOBLE *v.* MCMILLAN ET UX. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 538 So. 2d 714.

No. 89–590. WILKINSON *v.* SAFEWAY STORES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 866.

No. 89–592. GREGORY *v.* GREGORY. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 770 S. W. 2d 372.

No. 89–594. LANE ET UX. *v.* PETERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1092.

No. 89–596. BRAINIS *v.* JEFFERSON PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 575.

No. 89–598. PELSNIK *v.* CITY OF FAIRVIEW PARK, OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–600. ST. CLAIR ET AL. *v.* CITY OF CHICO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 199.

No. 89–602. HARVILL *v.* SPARROW. Super. Ct. D. C. Certiorari denied.

No. 89–603. BUCHOLTZ AVIATION, INC. *v.* CITY OF BUFFALO, NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 2d 915, 537 N. Y. S. 2d 370.

No. 89–604. ERNST & WHINNEY *v.* BRADFORD-WHITE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 1153.

No. 89–605. ROBERTSON *v.* STATE BOARD OF MEDICAL EXAMINERS ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–608. BLACK ET AL. *v.* BOLIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 1343.

No. 89–611. NEWSOME, WARDEN *v.* GUNN. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 949.

No. 89–613. ENGEL *v.* CLARK COUNTY, NEVADA. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1438.

No. 89–619. CAMOSCIO *v.* CROWLEY. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89–621. MARTINEZ, GOVERNOR OF FLORIDA, ET AL. *v.* RASKE. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 1496.

No. 89–637. PROZZILLO ET AL. *v.* AMERICAN STATES INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1069.

No. 89–638. CARVALHO *v.* "ANDREA C" ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 416.

No. 89–648. DIAZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 878 F. 2d 608.

No. 89–717. MAYER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 871.

No. 89–723. GELB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 881 F. 2d 1155.

No. 89–725. NELSON *v.* PRN PRODUCTIONS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 873 F. 2d 1141.

No. 89–727. THE PORTMAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 878.

No. 89–733. TOTH ET AL. *v.* USX CORP. C. A. 7th Cir. Certiorari denied. Reported below: 883 F. 2d 1297.

No. 89–744. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89–752. WEINSTEIN *v.* EHRENHAUS ET AL., DBA JACK EHRENHAUS ASSOCIATES. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 891.

No. 89–5104. RYONO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 867 F. 2d 614.

No. 89–5173. KITCHEN *v.* OJEDA ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–5333. JOSHUA ET UX. *v.* NEWELL, FOSTER HOME LICENSOR, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 871 F. 2d 884.

No. 89–5394. AGNEW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 219.

No. 89–5450. NAVARRO-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1396.

No. 89–5495. COOPER *v.* ELEAZER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1500.

No. 89–5519. NEUBAUER *v.* UNITED STATES; and
No. 89–5720. HILLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 817.

No. 89–5546. CORBIT *v.* HOTEL REDMONT ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 547 So. 2d 505.

No. 89–5603. MOORE *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 89–5622. SCHOOLCRAFT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 64.

No. 89–5636. SMITH *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5638. BARTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 773 and 878 F. 2d 829.

No. 89–5755. GALLAGHER *v.* HOLLAND. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 103.

No. 89–5756. GALLAGHER *v.* CURL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 103.

No. 89–5757. GALLAGHER *v.* CURL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1025.

No. 89–5758. HAYES *v.* BE&K CONSTRUCTION CO. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1438.

No. 89–5759. TREADWAY *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 866.

No. 89–5777. LEBLANC *v.* JANI-KING, INC., ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 538 So. 2d 1156.

No. 89–5779. JOHNS *v.* YEE. Sup. Ct. Haw. Certiorari denied.

No. 89–5780. HARTMANN *v.* HARTMANN ET AL. Ct. App. Mich. Certiorari denied.

No. 89–5781. MCCLEARY *v.* RAY. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89–5785. GAMBRELL *v.* MARTIN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–5786. FORSYTH *v.* WILLIAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 59.

No. 89–5787. WOODS *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 89–5788. JACKSON *v.* GENERAL MOTORS ACCEPTANCE CORP. Sup. Ct. Ala. Certiorari denied. Reported below: 549 So. 2d 38.

No. 89–5791. GRAY *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 821.

No. 89–5799. LOPEZ *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 2d 273.

No. 89–5801. DAVENPORT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 355 Pa. Super. 631, 509 A. 2d 1319.

No. 89–5812. HENDERSON *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 411.

No. 89–5819. HOLMES *v.* HORTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 69.

No. 89–5820. BOND *v.* JOHNSTONE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1315.

No. 89–5823. ENSMINGER *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89–5826. SPAHR *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 180 Ill. App. 3d 1104, 552 N. E. 2d 819.

No. 89–5834. MCDONALD *v.* BAILEY. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 579.

No. 89–5836. GLUNT *v.* KEOHANE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 870 F. 2d 651.

No. 89–5840. NICHOLS *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5841. BROWN *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–5842. JAMES *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Sup. Ct. S. C. Certiorari denied.

No. 89–5843. SMITH *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY AT PARCHMAN. C. A. 5th Cir. Certiorari denied.

No. 89–5846. YOWELL *v.* WITHROW. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 76.

No. 89–5859. ALLEN *v.* HOUSTON CHRONICLE PUBLISHING CO. C. A. 5th Cir. Certiorari denied.

No. 89–5897. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 1574.

No. 89–5905. MONGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 218.

No. 89–5908. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89–5910. PRITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 866.

No. 89–5911. MINES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 801.

No. 89–5912. HOLLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 354.

No. 89–5919. MASKULI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1390.

No. 89–5921. SCIARRINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 95.

No. 89–5932. ALVEY *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5942. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 867.

No. 89–5957. PAPATHANASION *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 1550.

No. 89–5960. MASON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 573.

No. 89–5965. RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 2d 1247.

No. 89–567. JIM SKINNER FORD, INC. *v.* WARREN ET UX. Sup. Ct. Ala. Motion of Automobile Dealers Association of Alabama et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 548 So. 2d 157.

Rehearing Denied

No. 89–2. CAMOSCIO *v.* TIERNEY, ADMINISTRATIVE JUSTICE, BOSTON MUNICIPAL COURT DEPARTMENT, ET AL., *ante*, p. 845;

No. 89–305. MCGUIRE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF MCGUIRE, A MINOR *v.* CITY OF WOODWARD, OKLAHOMA, ET AL., *ante*, p. 918;

No. 89–306. RILEY *v.* UNITED PARCEL SERVICE, *ante*, p. 918;

No. 89–445. BRUCE *v.* HARLAN & HARLAN ET AL., *ante*, p. 937;

No. 89–461. CAMOSCIO *v.* DUKAKIS ET AL., *ante*, p. 920;

No. 89–5117. CLARK *v.* NEW MEXICO, *ante*, p. 923; and

No. 89–5483. DITTA *v.* BRANCH MOTOR EXPRESS & FREIGHT DRIVERS, HELPERS, DOCKMEN & ALLIED WORKERS, LOCAL UNION 375, *ante*, p. 922. Petitions for rehearing denied.

No. 88–5763. SILVA *v.* CALIFORNIA, 488 U. S. 1019. Motion for leave to file petition for rehearing denied.

DECEMBER 5, 1989

*Miscellaneous Orders**

No. A–425 (89–6166). TOMPKINS *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

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*For the Court's order approving revisions to the Rules of this Court, see *post*, p. 1098.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

DECEMBER 6, 1989

Miscellaneous Order

No. A–433. DELUNA *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

DECEMBER 11, 1989

Miscellaneous Orders

No. — — ——. HUMPHREY *v.* BATES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BLACKMUN dissents and would grant the motion.

No. D–806. IN RE DISBARMENT OF BIAGGI. Disbarment entered. [For earlier order herein, see 492 U. S. 941.]

No. D–809. IN RE DISBARMENT OF EHRLICH. Disbarment entered. [For earlier order herein, see 492 U. S. 941.]

No. D–810. IN RE DISBARMENT OF SIMON. Disbarment entered. [For earlier order herein, see 492 U. S. 941.]

No. D–817. IN RE DISBARMENT OF SINGER. Phillip Singer, of Beverly Hills, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from

the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 6, 1989 [*ante*, p. 949], is hereby discharged.

No. D–847. IN RE DISBARMENT OF NIXON. It is ordered that Walter L. Nixon, Jr., of Biloxi, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–848. IN RE DISBARMENT OF WILLIAMS. It is ordered that Gerald Duane Williams, of Portland, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–1281. NGIRAINGAS ET AL. *v.* SANCHEZ ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 88–1400. FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL. C. A. 7th Cir. [Certiorari granted, 490 U. S. 1019.] Motion of respondent Imperial Chemical Industries PLC to expunge representations of counsel made during oral argument denied.

No. 88–1897. MICHIGAN DEPARTMENT OF STATE POLICE ET AL. *v.* SITZ ET AL. Ct. App. Mich. [Certiorari granted, *ante*, p. 806.] Motion of Mothers Against Drunk Driving in Michigan for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–2018. ILLINOIS *v.* RODRIGUEZ. App. Ct. Ill., 1st Dist. [Certiorari granted, *ante*, p. 932.] Motion of respondent to supplement the record granted.

No. 88–7351. WALTON *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, *ante*, p. 808.] Motion of petitioner for additional time for oral argument denied.

No. 89–156. PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* DAVENPORT ET UX. C. A. 3d Cir. [Certiorari

granted, *ante*, p. 808.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 89-243. ELI LILLY & CO. *v.* MEDTRONIC, INC. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 889.] Motion of Neuromedical Technologies, Inc., for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 89-255. UNITED STATES *v.* ENERGY RESOURCES CO., INC., ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 963.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 89-579. CHARTER CO. *v.* CERTIFIED CLASS IN THE CHARTER SECURITIES LITIGATION ET AL. C. A. 11th Cir. Motion of the parties to defer consideration of petition for writ of certiorari granted.

No. 89-5884. MILLER *v.* HALL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until January 2, 1990, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89-656. IN RE GABRIEL INTERNATIONAL, INC. Petition for writ of mandamus denied.

Certiorari Granted

No. 89-742. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* YOUNGBLOOD. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 882 F. 2d 956.

Certiorari Denied

No. 88-7595. CHAMBLESS ET AL. *v.* UNITED STATES; and DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 822 (first case).

No. 89–193. DISTRICT NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSN., ET AL. *v.* FINNIE. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–387. POSS ET AL. *v.* HOWARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 871 F. 2d 1000.

No. 89–454. AMOCO PRODUCTION CO. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 1243.

No. 89–455. CLOUD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 846.

No. 89–471. CONSTANT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 884 F. 2d 1398.

No. 89–475. PEAT MARWICK MAIN & CO. *v.* ROBERTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 646.

No. 89–488. SEPULVEDA ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1137.

No. 89–496. STICH *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (JENSEN, JUDGE, SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY, ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 1084.

No. 89–551. MOOR *v.* CITY OF AUBURN HILLS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 866.

No. 89–573. BOB HERBERT & ASSOCIATES, INC. *v.* KING MANUFACTURING & SALES, INC. C. A. 10th Cir. Certiorari denied.

No. 89–623. AVILA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 299.

No. 89–625. HILL *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 89–627. STANFIELD *v.* HORN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 580.

No. 89–630. CITY OF KILGORE, TEXAS *v.* MOORE. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 364.

No. 89–632. GK TRUCKING CORP. ET AL. *v.* LACINA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 2d 741.

No. 89–634. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND *v.* BANNER INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 2d 1285.

No. 89–636. BARRETT, DBA BARRETT OUTDOOR COMMUNICATIONS *v.* BURNS, COMMISSIONER OF TRANSPORTATION OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 212 Conn. 176, 561 A. 2d 1378.

No. 89–642. COLUMBUS-MCKINNON, INC. *v.* GEARENCH, INC. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 1221.

No. 89–643. GOLUB *v.* HYDRA OFFSHORE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 388.

No. 89–646. DUNCAN *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 819.

No. 89–683. WATERHOUSE *v.* RODRIGUEZ, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 883 F. 2d 1022.

No. 89–687. CLARK *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 89–714. POWELL ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89–718. MARTEL *v.* TALBOT ET AL. C. A. 1st Cir. Certiorari denied.

No. 89–719. UNITED STATES *v.* NOFZIGER. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 340, 878 F. 2d 442.

No. 89–730. DIETRICK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 336.

No. 89–765. WHITFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–5198. ANDERSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 112 Wash. 2d 546, 772 P. 2d 510.

No. 89–5540. HAINES ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 150 Wis. 2d 513, 442 N. W. 2d 36.

No. 89–5569. BUCEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 2d 1297.

No. 89–5578. THOMPSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 78 Md. App. 722.

No. 89–5591. LUTEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–5605. ANDERSON ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 872 F. 2d 1508.

No. 89–5637. PASTOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1030.

No. 89–5684. ABDUL-AKBAR *v.* FOWLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5732. WATSON *v.* JENNINGS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 875 F. 2d 313.

No. 89–5789. GIBSON *v.* UNITED STATES ARMY ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5815. TRIPATI *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari denied.

No. 89–5821. MCKEEVER *v.* BLOCK ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5838. BOUT *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 876 F. 2d 103.

No. 89–5857. HOSKINS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89–5899. JARRETT *v.* MINUTE MAN, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5907. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89–5917. NOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 860.

No. 89–5918. HENDERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–5929. DELAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 89–5939. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 433.

No. 89–5941. WEAKLEY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 539 N. E. 2d 994.

No. 89–5945. LIPSCOMB *v.* CAROTHERS, SUPERINTENDENT, YUKON KUSKOKWIM CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1320.

No. 89–5966. HARTOG *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 440 N. W. 2d 852.

No. 89–5967. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 1502.

No. 89–5968. LAWSE *v.* CORRY ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–5988. ABADIE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 2d 1260.

No. 88–7384. SOROLA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 769 S. W. 2d 920.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner, Joe Sorola, was indicted for capital murder under Tex. Penal Code Ann. § 19.03(a)(2) (Supp. 1988–1989). At trial, the State announced in open court that it would not seek the death penalty and jury selection proceeded as if the death penalty was not at issue.[1] As the lower court explained:

[1] See Tex. Code Crim. Proc. Ann., Art. 35.25 (Vernon 1989) (prescribing *voir dire* procedure for capital cases in which State has agreed not to seek death penalty). See generally *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

> "The record reflects that following the jury's decision that [Sorola] was guilty of capital murder, the jury was sent back to the jury room. Outside the presence of the jury, the trial court, the State, and [Sorola] agreed that because the State had waived the death penalty in this case, the proper procedure was to have the court assess punishment. The trial court then found [Sorola] guilty of capital murder and sentenced him to life imprisonment in the Texas Department of Corrections. Thereafter without objection, the court informed the parties he was going to release the jury panel." 674 S. W. 2d 809, 810 (Tex. App. 1984).

Petitioner appealed his conviction and sentence. The Texas Court of Criminal Appeals found that under state law, the State cannot waive its right to seek the death penalty, and a defendant cannot waive the right to a jury's assessment of punishment. 693 S. W. 2d 417, 419 (1985). Upon remand for a new trial, petitioner filed an application for writ of habeas corpus arguing that the Double Jeopardy Clause barred the State from seeking the death penalty if he were once again found guilty of capital murder on retrial.[2] The Texas courts rejected his claim and he now seeks certiorari.[3] 769 S. W. 2d 920, 926–928 (Tex. Crim. App. 1989). Because I believe the Double Jeopardy Clause bars the State from subjecting petitioner to the death penalty on retrial, I would grant the petition and reverse the Texas Court of Criminal Appeals.

I

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that the Double Jeopardy Clause prohibits the State from subjecting a defendant who received a life sentence in his first sentencing proceeding to the possibility of a death sentence on retrial after reversal of his conviction or sentence. The Court concluded that because the capital sentencing proceeding "in all relevant respects was like the immediately preceding trial on the issue of guilt or in-

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[2] Although the Texas courts found reversible error only at the sentencing phase, under Texas law petitioner is entitled to a new trial on both guilt and sentencing. 769 S. W. 2d 920, 923 (Tex. Crim. App. 1989).

[3] We have jurisdiction under 28 U. S. C. § 1257 (1982 ed.) because the judgment rejecting petitioner's double jeopardy claim is "final." See *Bullington* v. *Missouri*, 451 U. S. 430, 437, n. 8 (1981); see also *Abney* v. *United States*, 431 U. S. 651 (1977).

nocence," *id.*, at 438, the jury's conclusion that the evidence did not support the death penalty constituted an acquittal of death. *Id.*, at 445. In *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984), the Court made clear that the fact that the acquittal resulted from an error of law did not deprive it of finality under the Double Jeopardy Clause.

There should be no doubt that *Bullington* and *Rumsey* apply to capital sentencing determinations made by Texas juries.[4] Thus if a Texas jury had determined that petitioner deserved a life sentence, this case would require a straightforward application of *Bullington* and *Rumsey*. In this case, the life sentence was imposed by the trial judge after the State waived the right to seek the death penalty. But this difference is of no significance for double jeopardy purposes because the form of the judicial action does not determine whether it constitutes an acquittal. Rather, the determination turns on "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977).[5] In the context of capital sentencing, "*Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case'

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[4] The Texas capital sentencing scheme has been described in detail elsewhere. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 310–311 (1989). It is sufficient for present purposes to note that the Texas capital sentencing scheme has the same characteristics as the Missouri and Arizona sentencing proceedings that made them comparable to a trial for double jeopardy purposes: (1) the sentencer's discretion is limited to two options: life or death; (2) the sentencer's discretion is guided by substantive standards; and (3) the proceeding resembles a trial at which evidence is introduced and in which the State must prove the existence of predicate facts justifying the death penalty beyond a reasonable doubt. Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1988–1989). See *Bullington*, *supra*, at 438; *Rumsey*, 467 U. S., at 209. Thus "when the [Texas] sentencer imposes a sentence of life imprisonment in a capital sentencing proceeding, it has determined that the prosecutor has failed to prove its case." *Id.*, at 209–210.

[5] The Texas Court of Criminal Appeals held that the trial judge's action did not constitute an acquittal on the merits because the judge made no findings that the death penalty was not justified. This finding is not binding on this Court, for whether a trial judge's action constitutes an acquittal is a federal question. *Justices of Boston Municipal Court* v. *Lydon*, 466 U. S. 294, 321 (1984) (opinion of BRENNAN, J.). Cf. *Crist* v. *Bretz*, 437 U. S. 28, 37–38 (1978).

that the death penalty is appropriate." Poland v. *Arizona*, 476 U. S. 147, 155 (1986) (emphasis in original).

The judge's imposition of a life sentence cannot be characterized as anything other than an acquittal of death. The trial judge imposed a sentence of life imprisonment because the State waived its right to seek the death penalty. Thus, there was absolutely no evidence in the record to support the death penalty. That the judge's decision was based on the complete lack of evidence rather than the existence of insufficient evidence should strengthen petitioner's claim to double jeopardy protection. A core purpose of the Double Jeopardy Clause is to ensure that the state does not get a second opportunity to prove its case after failing to do so initially. This principle is equally applicable in the capital sentencing context: "[h]aving received 'one fair opportunity to offer whatever proof it could assemble,' the State is not entitled to another." *Bullington*, *supra*, at 446 (quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978)).

To be sure, *Bullington* and *Rumsey* relied on the fact that the sentencer had determined after a trial-like hearing that the evidence was insufficient to impose the death penalty and in this case there was no sentencing hearing. But the significance of the presence of a trial-like proceeding was that it distinguished a capital case from the noncapital sentencing context, where the imposition of a particular sentence is not an implied acquittal of a greater sentence. See *Bullington*, 451 U. S., at 439–441. The Court justified an exception to the general rule because of the unique features of the capital sentencing scheme where the state bears the burden of proving, often beyond a reasonable doubt, that death is the appropriate penalty. *Ibid.* As noted, the Texas capital punishment statute requires the State to prove certain facts beyond a reasonable doubt. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1988–1989). Thus, the prosecutor's decision to waive the death penalty makes this case more like *Bullington* than a decision to seek a specific sentence in a noncapital sentencing context; it reflects the prosecutor's conclusion that there was insufficient evidence to justify the death penalty. See *Bullington*, *supra*, at 441 (use of beyond-reasonable-doubt standard reflects society's belief that defendant's interests are so great that State should bear the risk of error). The fact

that the prosecutor responsibly acknowledges the weakness of the case should not lessen the effect of the trial judge's imposition of a life sentence. A contrary conclusion would mean that the Double Jeopardy Clause protects the defendant only if the prosecutor, knowing that the case is weak, actually presents it to the jury and it ratifies that initial judgment by rejecting the death penalty. We do not have such a rule in the guilt phase. See *United States* v. *Martin Linen Supply Co.*, *supra*, at 574 (no difference for double jeopardy purposes between entry of judgment of acquittal before or after submission to jury); *Smalis* v. *Pennsylvania*, 476 U. S. 140, 144–145 (1986) (granting demurrer at end of state's case constitutes acquittal even if based on erroneous legal ruling). I see no reason to require such a rule at the sentencing phase.[6]

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[6] I find it irrational and perhaps unconstitutional for state law to require the parties to proceed with a capital sentencing hearing when both parties agree that the death penalty is inappropriate. A prosecutor's decision to waive the death penalty rather than burden the defendant, the court, and the jury with a meaningless proceeding should be respected, if not applauded. The Texas law significantly interferes with prosecutorial discretion and raises grave constitutional concerns in a capital sentencing context. It creates institutional pressure on a prosecutor to charge capital murder even if he believes that the death penalty is unwarranted to ensure that the defendant will be sentenced to life. Pressuring a prosecutor to charge capital murder even when he believes the evidence does not support the death penalty increases the risk of arbitrary imposition of the death penalty. Cf. *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980) (prohibiting jury from considering lesser included offense to capital murder increases arbitrariness by depriving jury of "third option" between acquittal and death penalty).

I pause to note just how odd the state court's decision that the prosecutor may not waive the death penalty is. The Texas Court of Criminal Appeals acknowledged that a trial judge has statutory authority to enter a sentence of life imprisonment in several types of cases: (1) when the defendant is a juvenile; (2) when the defendant is found guilty of a lesser included offense; (3) when the jury is unable to answer the questions at the sentencing hearing; and (4) even after the jury imposes a verdict of death, when the trial judge determines that the evidence is insufficient. 769 S. W. 2d, at 927 (discussing statutes). Concluding that state law precludes a trial judge from imposing a life sentence when the prosecutor affirmatively waives the death penalty is especially anomalous when the Texas Criminal Code provides for a special *voir dire* procedure in capital cases in which the State waives the death penalty. See Tex. Code Crim. Proc. Ann, Art. 35.25 (Vernon 1989) (applicable "in capital cases *in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty* . . ." (emphasis added)). See also 769 S. W. 2d, at 933–936 (Clinton, J., concurring) (arguing that rule prohibiting

Finally, the fact that the trial judge did not have the authority under state law to allow the State to waive the death penalty is irrelevant for purposes of the Double Jeopardy Clause.[7] We have consistently held that "the fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination, but it does not alter its essential character." *United States* v. *Scott*, 437 U. S. 82, 98 (1978) (quoting *id.*, at 106 (BRENNAN, J., dissenting)); see also *Rumsey*, 467 U. S., at 211. Moreover, the trial judge's actions in this case are not distinguishable from those in *Fong Foo* v. *United States*, 369 U. S. 141 (1962) *(per curiam)*. In that case, the District Court ordered the jury to enter judgments of acquittal as to all the defendants based on insufficient evidence and prosecutorial misconduct. The Court held that even if the trial judge's actions were improper, the protection of the Double Jeopardy Clause attached to the acquittal. *Id.*, at 143. If the judgment in *Fong Foo* constituted an acquittal, the life sentence in this case must constitute an acquittal of death.

State from waiving death penalty is vestige from era before *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and should not be continued). Although this Court cannot review a state court's interpretation of its own laws, neither may a State adopt a rule which effectively limits a trial judge's ability to grant an acquittal. Cf. *Crist* v. *Bretz*, 437 U. S., at 37–38 (State cannot adopt its own rule about when jeopardy attaches).

[7] Petitioner was clearly placed in jeopardy as to the sentence: he was indicted for capital murder, the jury was sworn and empaneled, and it convicted him of capital murder. *Ibid.* The State argues, however, that because petitioner appealed on the issue of the trial judge's authority to impose a life sentence, the concept of "continuing jeopardy" applies and the State is free to subject him to the death penalty on retrial. See *North Carolina* v. *Pearce*, 395 U. S. 711, 719–720 (1969) (when defendant wins reversal of conviction on appeal, "the slate [is] wiped clean" and double jeopardy does not bar imposition of harsher punishment on retrial). This begs the precise question in this case. Because the trial judge's actions constituted an acquittal, the concept of continuing jeopardy is inapplicable. See *Bullington*, 451 U. S., at 443 ("[T]he 'clean slate' rationale recognized in *Pearce* is inapplicable whenever a jury agrees or an appellate court decides that the prosecution has not proved its case"); see also *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145 (1986) ("continuing jeopardy" inapplicable when trial judge's ruling constitutes an acquittal). Petitioner's decision to appeal his sentence cannot transform what was already an acquittal into something less.

II

Even if I did not conclude that the Double Jeopardy Clause prevents the imposition of the death penalty on resentencing, my belief that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), would compel me to vacate the judgment below and remand for resentencing on the condition that the State be precluded from imposing the death sentence.

No. 89–450. TEXAS MEDICAL ASSN. ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 5th Cir. Motion of petitioners to strike brief of Blue Cross/Blue Shield of Texas, Inc., denied. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 875 F. 2d 1160.

No. 89–595. RATELLE, WARDEN *v.* MARTIN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 875 F. 2d 870.

No. 89–650. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* HARRIS. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 756.

JUSTICE BRENNAN, concurring.

I agree that respondent's lawyers rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion), I would hold that the State is precluded on remand from imposing a sentence of death.

No. 89–653. GAGLIARDI *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 879 F. 2d 856.

No. 89–654. DEAN *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 881 F. 2d 948.

No. 89–5158. ASH *v.* WILT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 875 F. 2d 314.

No. 89–5319. FRANZEN *v.* DEEDS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 877 F. 2d 26.

No. 89–5795. PUTMAN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 89–5802. HOLLADAY *v.* ALABAMA. Sup. Ct. Ala.; and

No. 89–5958. VALERIO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 89–5802, 549 So. 2d 135; No. 89–5958, 105 Nev. 1051, 810 P. 2d 344.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 89–5392. COFIELD *v.* ADAMS ET AL., *ante*, p. 921;

No. 89–5532. LAURENCO *v.* SULLIVAN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ante*, p. 956; and

No. 89–5640. READ *v.* PROTHONOTARY, NEW CASTLE COUNTY, DELAWARE, ET AL., *ante*, p. 943. Petitions for rehearing denied.

DECEMBER 13, 1989

Dismissal Under Rule 53

No. 89–536. PONCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

DECEMBER 28, 1989

Dismissal Under Rule 53

No. 89–269. DOULIN ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 868 F. 2d 959.

Miscellaneous Order

No. A–476. CHABAD ET AL. *v.* CITY OF PITTSBURGH. Motion of City of Pittsburgh to vacate the order entered by JUSTICE BRENNAN on December 22, 1989, denied. THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE SCALIA would grant the motion.

JANUARY 8, 1990

Appeals Dismissed

No. 89–556. LOUISIANA EX REL. GUSTE, ATTORNEY GENERAL OF LOUISIANA *v.* UNITED STATES ET AL.;

No. 89–557. BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE *v.* UNITED STATES ET AL.; and

No. 89–771. LOUISIANA EX REL. ROEMER, GOVERNOR OF LOUISIANA *v.* UNITED STATES ET AL. Appeals from D. C. E. D. La. dismissed for want of jurisdiction. Reported below: 692 F. Supp. 642; 718 F. Supp. 499, 521, and 525.

No. 89–6061. RAWLS *v.* UNITED STATES. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 823 F. 2d 1553.

Certiorari Granted—Vacated and Remanded

No. 89–647. CITY OF IDAHO FALLS, IDAHO *v.* PROJECT 80'S, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469 (1989). Reported below: 876 F. 2d 711.

No. 89–5991. PATTERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). Reported below: 299 S. C. 280, 384 S. E. 2d 699.

Miscellaneous Orders

No. — — ——. BREWER *v.* OKLAHOMA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. FLEMING *v.* DISTRICT COURT FOR THE COUNTY OF EL PASO, COLORADO, ET AL.; and

No. — — ——. SALTER *v.* GOLDBERG ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. — — ——. EWING *v.* MAPLES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BLACKMUN dissents and would grant the motion.

No. A–259. FAZZINI *v.* GLUCH ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE BLACKMUN dissents and would grant the motion.

No. A–389. ROSSI *v.* YMCA OF GREATER NEW YORK. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–452. PACIFIC MUTUAL LIFE INSURANCE CO. *v.* HASLIP ET AL. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that execution and enforcement of the judgment of the Supreme Court of Alabama, case No. 87–482, is stayed pending the timely filing and disposition of a petition for writ of certiorari. In the event the petition for writ of certiorari is denied, this order terminates automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit Court of Jefferson County, Alabama, Civil Action No. CV–82–2453, remaining in effect.

No. D–824. IN RE DISBARMENT OF HOPP. Kenneth H. Hopp, of Yucaipa, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 6, 1989 [*ante*, p. 950], is hereby discharged.

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Motion of Georgia for leave to file a rebuttal brief granted. [For earlier order herein, see, *e. g.*, *ante*, p. 961.]

No. 88–1323. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* EVERHART ET AL. C. A. 10th Cir. [Certiorari granted, 490 U. S. 1080.] Motion of respondents to substitute Doris Everhart as party respondent in place of Thomas Everhart, deceased, granted.

No. 88–1597. BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) ET AL. *v.* MERGENS, BY AND

THROUGH HER NEXT FRIEND, MERGENS, ET AL. C. A. 8th Cir. [Certiorari granted, 492 U. S. 917.] Motion of petitioner for leave to file a reply brief out of time granted.

No. 88–1872. RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL.; and

No. 88–2074. FRECH ET AL. *v.* RUTAN ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 807.] Motion of North Carolina Professional Fire Fighters Association for leave to file a brief as *amicus curiae* granted.

No. 88–1891. M & M CONSTRUCTION CO., INC. *v.* GREAT AMERICAN INSURANCE CO., *ante*, p. 801. Motion of appellee for damages denied.

No. 88–1916. MINNESOTA *v.* OLSON. Sup. Ct. Minn. [Certiorari granted, *ante*, p. 806.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Connecticut et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied.

No. 88–1951. UNITED STATES *v.* DALM. C. A. 6th Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General to permit Christine Desan Husson, Esq., to present oral argument *pro hac vice* granted.

No. 88–1972. ILLINOIS *v.* PERKINS. App. Ct. Ill., 5th Dist. [Certiorari granted, *ante*, p. 808.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–7146. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS ET AL. Sup. Ct. Ark. [Certiorari granted, 492 U. S. 917.] Motion of respondent Arkansas' counsel to be designated to present oral argument on behalf of both respondents granted. Request for divided argument denied.

No. 89–61. UNITED STATES *v.* OJEDA RIOS ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 889.] Motion of respondents Ojeda Rios, Diamante, Garcia, Ramos, Claudio, Negron, Carrion, Ruiz, and Osorio for reconsideration of order appointing counsel and to appoint Richard A. Reeve, Esq., to argue the case granted. Motion of respondents Garcia, Ramos, Claudio, Negron, Carrion, and Ruiz for reconsideration of order appointing counsel and to ap-

point James L. Sultan, Esq., to brief the case denied. The order appointing Margaret P. Levy, Esq., entered December 4, 1989 [*ante*, p. 990], is vacated. Respondents are directed to file a single brief.

No. 89–213. PENNSYLVANIA *v.* MUNIZ. Super. Ct. Pa. [Certiorari granted, *ante*, p. 916.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 89–386. PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY; and PORT AUTHORITY TRANS-HUDSON CORP. *v.* FOSTER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 932] Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 89–390. PENSION BENEFIT GUARANTY CORPORATION *v.* LTV CORP. ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 932.] Motions of American Society of Pension Actuaries, Armco et al., and Retired Employees Benefits Coalition, Inc., for leave to file briefs as *amici curiae* granted.

No. 89–564. GLOSEMEYER ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD ET AL. C. A. 8th Cir. Motion of National Association of Reversionary Property Owners for leave to file a brief as *amicus curiae* granted.

No. 89–5915. SMACZNIAK *v.* INTERNAL REVENUE SERVICE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until January 29, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–5894. IN RE MORRIS. C. A. 6th Cir.;

No. 89–5943. IN RE MANCHESTER. C. A. 3d Cir.; and

No. 89–6233. IN RE SHELTON ET AL. C. A. 2d Cir. Petitions for writs of common-law certiorari denied.

No. 89–6092. IN RE CYNTJE. Petition for writ of habeas corpus denied.

No. 89–743. IN RE HAGEBUSH ET AL.; and
No. 89–796. IN RE POLYAK. Petitions for writs of mandamus denied.

Certiorari Granted

No. 89–322. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR RAWSON, ET AL. Sup. Ct. Idaho. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; brief for respondents must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 115 Idaho 785, 770 P. 2d 794.

No. 89–393. BEGIER, TRUSTEE *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; brief for respondent must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 878 F. 2d 762.

No. 89–542. PERPICH, GOVERNOR OF MINNESOTA, ET AL. *v.* DEPARTMENT OF DEFENSE ET AL. C. A. 8th Cir. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioners must be received by the Clerk on or before February 9, 1990; brief for respondents must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 880 F. 2d 11.

No. 89–453. METRO BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Motion of Competitive Enterprise Institute for leave to file a brief as *amicus curiae* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; briefs for

respondents must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 277 U. S. App. D. C. 134, 873 F. 2d 347.

No. 89-535. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* STROOP ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; brief for respondents must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 870 F. 2d 969.

No. 89-700. ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP *v.* SHURBERG BROADCASTING OF HARTFORD, INC., ET AL. C. A. D. C. Cir. Motion of Congressional Black Caucus et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; briefs for respondents must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 278 U. S. App. D. C. 24, 876 F. 2d 902.

No. 89-5691. HUGHEY *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, and the parties are directed to adhere to the following briefing schedule: Brief for petitioner must be received by the Clerk on or before February 9, 1990; brief for respondent must be received by the Clerk on or before March 6, 1990; and a reply brief, if any, must be received by the Clerk on or before March 16, 1990. Reported below: 877 F. 2d 1256.

Certiorari Denied. (See also Nos. 89-6061, 89-5894, 89-5943, and 89-6233, *supra*.)

No. 89-222. PIRAINO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89-278. KENNISON ET AL. *v.* HOLCOMBE. Ct. App. S. C. Certiorari denied.

No. 89-303. TEXAS *v.* SMITH. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 754 S. W. 2d 310.

No. 89-312. SYRACUSE PEACE COUNCIL ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 276 U. S. App. D. C. 38, 867 F. 2d 654.

No. 89-317. WALL *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 871 F. 2d 1540.

No. 89-346. ALASKA AIRLINES, INC., ET AL. *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 307 Ore. 406, 769 P. 2d 193.

No. 89-352. SILVERSTEIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 768, 543 N. E. 2d 729.

No. 89-366. WOMEN INVOLVED IN FARM ECONOMICS *v.* YEUTTER, SECRETARY OF AGRICULTURE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 116, 876 F. 2d 994.

No. 89-407. WEIDNER ET AL. *v.* ALASKA ET AL. Ct. App. Alaska. Certiorari denied. Reported below: 764 P. 2d 717.

No. 89-424. MISSOURI *v.* BULLOCH. Sup. Ct. Mo. Certiorari denied. Reported below: 771 S. W. 2d 71.

No. 89-433. DIRECTOR OF REVENUE OF MISSOURI *v.* HACKMAN ET UX. Sup. Ct. Mo. Certiorari denied. Reported below: 771 S. W. 2d 77.

No. 89-480. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 893.

No. 89-484. FAIRPRENE INDUSTRIAL PRODUCTS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1318.

No. 89-497. HARRIS COUNTY FLOOD CONTROL DISTRICT ET AL. *v.* JOHNSTON. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1565.

No. 89-508. UNITED STATES CAN CO. ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 150 Wis. 2d 479, 441 N. W. 2d 710.

No. 89–513. FISHER *v.* KRAJEWSKI, JUDGE, LAKE COUNTY, INDIANA COUNTY COURT. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1057.

No. 89–514. TRINITY COALITION, INC. *v.* COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 759 S. W. 2d 762.

No. 89–544. CURCIO ET AL. *v.* BOYLE, SUFFOLK COUNTY ATTORNEY, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 733, 543 N. E. 2d 83.

No. 89–549. STAGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 881 F. 2d 1527.

No. 89–553. GUCCIONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 847 F. 2d 1031.

No. 89–558. GREY *v.* FIRST NATIONAL BANK OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 169 Ill. App. 3d 936, 523 N. E. 2d 1138.

No. 89–563. VIEUX CARRE PROPERTY OWNERS, RESIDENTS & ASSOCIATES, INC. *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 453.

No. 89–565. UNITED TRANSPORTATION UNION ET AL. *v.* CSX TRANSPORTATION, INC. C. A. 2d Cir. Certiorari denied. Reported below: 879 F. 2d 990.

No. 89–569. HOODKROFT CONVALESCENT CENTER, INC., ET AL. *v.* NEW HAMPSHIRE DIVISION OF HUMAN SERVICES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 968.

No. 89–575. HARTER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 276 U. S. App. D. C. 400, 871 F. 2d 1140.

No. 89–597. GREGORY, SHERIFF OF PATRICK COUNTY, VIRGINIA, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 871 F. 2d 1239.

No. 89–606. HUBER *v.* LEIS, SHERIFF, HAMILTON COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 579.

No. 89–612. OTTAVIANI ET AL. *v.* STATE UNIVERSITY OF NEW YORK AT NEW PALTZ ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 365.

No. 89–618. BRUNO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 1087.

No. 89–657. CALABRO *v.* PENNSYLVANIA WORKMEN'S COMPENSATION APPEAL BOARD (ROCKWELL INTERNATIONAL). Pa. Commw. Ct. Certiorari denied.

No. 89–659. ELECTRO-TECH, INC. *v.* H. F. CAMPBELL CO. ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 433 Mich. 57, 445 N. W. 2d 61.

No. 89–660. ENGEL *v.* CITY OF STOCKTON, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 896.

No. 89–661. TWENTIETH CENTURY FOX FILM CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 882 F. 2d 656.

No. 89–663. MAYER *v.* CHESAPEAKE INSURANCE CO. LTD. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 877 F. 2d 1154.

No. 89–667. LOFTIS *v.* LOS ANGELES UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 386.

No. 89–669. GOAD *v.* GOAD. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 768 S. W. 2d 356.

No. 89–670. ZAPP ET AL. *v.* UNITED TRANSPORTATION UNION. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 1439.

No. 89–673. YIAMOUYIANNIS *v.* THOMPSON ET AL. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 764 S. W. 2d 338.

No. 89–676. PEARSON ET UX. *v.* DUCK. C. A. 6th Cir. Certiorari denied. Reported below: 871 F. 2d 579.

No. 89–678. POLING *v.* MURPHY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 757.

No. 89-684. SAMPLE, INC. *v.* PENDLETON WOOLEN MILLS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1319.

No. 89-691. TYLER ET AL. *v.* BERODT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 705.

No. 89-692. BIG APPLE INDUSTRIAL BUILDINGS, INC., ET AL. *v.* PROCTER & GAMBLE CO. ET AL.; and

No. 89-805. AMERICAN INTERNATIONAL CONTRACTORS, INC. *v.* PROCTER & GAMBLE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 879 F. 2d 10.

No. 89-693. MARINE TRANSPORT LINES, INC. *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS. C. A. 2d Cir. Certiorari denied. Reported below: 878 F. 2d 41.

No. 89-694. ELECTRIC POWER BOARD OF CHATTANOOGA *v.* MONSANTO CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1368.

No. 89-698. LEISURE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 772 S. W. 2d 674.

No. 89-702. CHAMPION MORTGAGE CO. *v.* LAKE TRAVIS ISLAND LTD. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 1433.

No. 89-703. EWING *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 772 S. W. 2d 774.

No. 89-708. MIAMI CENTER LIMITED PARTNERSHIP *v.* BANK OF NEW YORK. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 780.

No. 89-710. ALASKA DIVERSIFIED CONTRACTORS, INC., ET AL. *v.* LOWER KUSKOKWIM SCHOOL DISTRICT. Sup. Ct. Alaska. Certiorari denied. Reported below: 778 P. 2d 581.

No. 89-712. ALABAMA *v.* HELMS. Ct. Crim. App. Ala. Certiorari denied. Reported below: 549 So. 2d 598.

No. 89-713. MOR-FLO INDUSTRIES, INC., ET AL. *v.* STATE INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 883 F. 2d 1573.

No. 89–716. WATSTEIN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1446.

No. 89–720. AVDEL CORP. *v.* JALIL. C. A. 3d Cir. Certiorari denied. Reported below: 873 F. 2d 701.

No. 89–721. AVERBACH *v.* RIVAL MANUFACTURING CO. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 1196.

No. 89–724. SOUTH DAKOTA ET AL. *v.* KANSAS CITY SOUTHERN RAILWAY CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 880 F. 2d 40.

No. 89–726. ACRISON, INC. *v.* HITESMAN. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1383.

No. 89–731. FRANK ROSENBERG, INC. *v.* TAZEWELL COUNTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 1165.

No. 89–732. HANOVER INSURANCE CO. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 880 F. 2d 1503.

No. 89–734. BOHANON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–737. COOK *v.* SUPREME COURT OF INDIANA ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 526 N. E. 2d 703.

No. 89–738. AGIPCOAL USA, INC. *v.* INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 62.

No. 89–740. MIURA ET AL. *v.* WESTERN UNION INTERNATIONAL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89–745. CITY OF ROCKWALL, TEXAS *v.* MCKEE. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 409.

No. 89–750. WILLS *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 884 F. 2d 1399.

No. 89–754. RADIX GROUP INTERNATIONAL, INC. *v.* MCGRIFF TREADING CO., INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–755. HARNESS *v.* HARTZ MOUNTAIN CORP. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 1307.

No. 89–762. NENEMAN *v.* TASSIN; and
No. 89–776. NENEMAN *v.* DURANT, ADMINISTRATRIX OF THE ESTATE OF DURANT, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 884 F. 2d 1350.

No. 89–766. SLAUGHTER *v.* AT&T INFORMATION SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 412.

No. 89–768. MATHES, AKA MATHEWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1392.

No. 89–769. TEXAS APPAREL CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 883 F. 2d 66.

No. 89–770. SMEC, INC. *v.* DATASCOPE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 879 F. 2d 820.

No. 89–772. HOANG *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 873 F. 2d 1443.

No. 89–774. MCCARTY *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 883 F. 2d 1027.

No. 89–788. VENUS INDEPENDENT SCHOOL DISTRICT ET AL. *v.* SHELLY C., BY NEXT FRIENDS, SHELBIE C. ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 862.

No. 89–790. EIMANN ET AL. *v.* SOLDIER OF FORTUNE MAGAZINE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 830.

No. 89–792. OLYMPIA BREWING CO. *v.* SINGER, SUCCESSOR IN INTEREST TO TROSTER, SINGER & CO. C. A. 2d Cir. Certiorari denied. Reported below: 878 F. 2d 596.

No. 89–795. WEST *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–806. SPARKS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 52.

No. 89–808. SUTTON ET AL. *v.* NATIONAL INTERGROUP, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 89–810. DOE, A MINOR, BY AND THROUGH HIS PARENT AND NEXT FRIEND, DOE *v.* SUMNER COUNTY BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1340.

No. 89–818. JAFFE *v.* MICHIGAN DEPARTMENT OF TREASURY. Ct. App. Mich. Certiorari denied. Reported below: 172 Mich. App. 116, 431 N. W. 2d 416.

No. 89–820. KINDIG *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–822. OCORO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–824. GAGLIARDI ET AL. *v.* DUQUESNE LIGHT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 511.

No. 89–830. MARTIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1092.

No. 89–832. PEEL *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 235.

No. 89–833. GAGLIARDI *v.* SORICK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 511.

No. 89–840. PULLIAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–842. BROCK *v.* HUNSICKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 510.

No. 89–856. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1309.

No. 89–892. TRAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89–895. DOWNING ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 1077.

No. 89–5237. J. L. *v.* VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Sup. Ct. Vt. Certiorari denied. Reported below: 151 Vt. 480, 563 A. 2d 241.

No. 89–5325. HILLERY *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–5398. JOHNSTON *v.* ACTING COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 2d 885.

No. 89–5430. SNYDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 1322.

No. 89–5434. STATEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 382.

No. 89–5437. THOMAS *v.* UNITED STATES; and
No. 89–5831. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 431.

No. 89–5482. WILKINS *v.* MCDANIEL. C. A. 7th Cir. Certiorari denied. Reported below: 872 F. 2d 190.

No. 89–5539. GUDIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1086.

No. 89–5552. BARNTHOUSE *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 775 P. 2d 545.

No. 89–5553. BRAGGS *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5614. HOPKINS *v.* ARIZONA DEPARTMENT OF REAL ESTATE ET AL. Ct. App. Ariz. Certiorari denied.

No. 89–5632. AMOS *v.* ILLINOIS (two cases). Sup. Ct. Ill. Certiorari denied. Reported below: 125 Ill. 2d 567, 537 N. E. 2d 812 (first case); 126 Ill. 2d 561, 541 N. E. 2d 132 (second case).

No. 89–5676. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1073.

No. 89–5749. KING *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1082.

No. 89–5753. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 973.

No. 89–5825. QUARLES *v.* CHAMPION INTERNATIONAL CORP. Sup. Ct. Tex. Certiorari denied.

No. 89–5832. PERRY *v.* BALL, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 416.

No. 89–5865. SPYCHALA *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 871.

No. 89–5868. HARRIS *v.* DAVIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 2d 461.

No. 89–5869. ASSENATO *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 186 Ill. App. 3d 331, 542 N. E. 2d 457.

No. 89–5870. WILLIAMS *v.* BERNARD ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5874. FRANK *v.* BROOKHART, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 671.

No. 89–5875. HUDSON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 210 Cal. App. 3d 784, 258 Cal. Rptr. 563.

No. 89–5876. COLEMAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 562 A. 2d 1171.

No. 89–5879. THAKKAR *v.* MARTIN. C. A. 3d Cir. Certiorari denied.

No. 89–5881. PATTERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 882 F. 2d 595.

No. 89–5882. WEST *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1441.

No. 89–5888. HUTCHINSON *v.* JUSTICE COURT OF NEEDLES JUDICIAL DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–5895. DAWKINS *v.* NABISCO BRANDS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 585.

No. 89–5902. WESTLAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1086.

No. 89–5903. BODDIE *v.* AMERICAN BROADCASTING COS., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 267.

No. 89–5913. YOUNG *v.* ST. LOUIS UNIVERSITY ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 773 S. W. 2d 143.

No. 89–5920. MURRAY *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 71.

No. 89–5922. SHULTS *v.* HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 70 Haw. 658, 796 P. 2d 1002.

No. 89–5923. GAMBRILL *v.* PRISONER REVIEW BOARD. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 180 Ill. App. 3d 1109, 552 N. E. 2d 822.

No. 89–5926. SUTTON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1070.

No. 89–5927. HASSAN *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5931. FRIEND *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–5933. TAYLOR *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–5936. SHAW *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1070.

No. 89–5940. THOMAS *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5944. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 882 F. 2d 331.

No. 89–5946. JACKSON *v.* HOROWITZ. C. A. 3d Cir. Certiorari denied.

No. 89–5950. LEBBOS *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89–5951. GAINER *v.* DOE ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–5954. STROOP ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 870 F. 2d 969.

No. 89–5955. BYNUM *v.* BUREAU OF PRISONS. C. A. 11th Cir. Certiorari denied.

No. 89–5956. BYNUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89–5964. MARTINEZ *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 881 F. 2d 921.

No. 89–5969. LAVRICK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 146 App. Div. 2d 648, 536 N. Y. S. 2d 548.

No. 89–5970. GAINER *v.* KRAMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 262.

No. 89–5972. MURRAY *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 71.

No. 89–5973. UPSHAW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 861.

No. 89–5974. SMITH *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–5975. SOBAMOWO *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 574.

No. 89–5976. KEPHART *v.* GOODSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–5977. ROCHON *v.* LOUISIANA STATE PENITENTIARY INMATE ACCOUNT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 845.

No. 89–5978. STOKES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 548 So. 2d 118.

No. 89–5979. FERGUSON *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 89–5980. DONALSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 192 Ga. App. 37, 383 S. E. 2d 588.

No. 89–5982. SOTO ALVAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 876 F. 2d 209.

No. 89–5983. CHASE *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 89–5986. SPARKS *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 89–5987. CHEARS *v.* MCWHERTER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 89–5992. WATSON *v.* RISLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1025.

No. 89–5993. TEASLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89–5994. STUDNICKA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1086.

No. 89–5995. RIGGINS *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 576.

No. 89–5996. RAHIMI-ARDEBILI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1320.

No. 89–6000. SMALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 77.

No. 89–6001. HAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1393.

No. 89–6004. RODMAN *v.* DALTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89–6007. WHEAT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 775 S. W. 2d 155.

No. 89–6008. MCNEAL *v.* RDO, SUPERINTENDENT, GREEN MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89-6009. RUBIN *v.* THRESHOLDS, INC. C. A. 7th Cir. Certiorari denied.

No. 89-6010. NEWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1439.

No. 89-6012. D'SOUZA *v.* MALONEY ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-6014. MAZO-SUAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89-6016. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1320.

No. 89-6018. REUTER *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89-6020. LAWRENCE *v.* TEXAS EMPLOYMENT COMMISSION. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 89-6021. POLLARD *v.* SMITH, SHERIFF, BELL COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 72.

No. 89-6022. LEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 878.

No. 89-6023. MARTIN *v.* TATE. C. A. 6th Cir. Certiorari denied.

No. 89-6025. WILLIAMS *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-6029. LONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89-6031. DEMOS *v.* RIVELAND, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. Sup. Ct. Wash. Certiorari denied.

No. 89-6032. DARUD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 1034.

No. 89-6033. LABAYRE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 446 N. W. 2d 290.

No. 89–6036. CLINE *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–6037. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 1007.

No. 89–6038. JONES *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–6041. WION *v.* WILSON, DETECTIVE, MIDLAND CITY POLICE DEPARTMENT. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 869.

No. 89–6048. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 1428.

No. 89–6050. ABDOLLAHI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 871.

No. 89–6051. PAIGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 998.

No. 89–6052. JEFFERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 558 A. 2d 298.

No. 89–6055. RYAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89–6057. WHITING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1092.

No. 89–6058. HAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1393.

No. 89–6059. GILYARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89–6063. THARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1393.

No. 89–6064. NORD *v.* LINCOLN COUNTY CIRCUIT COURT. Sup. Ct. Ark. Certiorari denied.

No. 89–6065. BILAL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 89–6066. VISSER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (WELLS FARGO BANK, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 89–6069. CHARLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 355.

No. 89–6071. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 323.

No. 89–6074. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1072.

No. 89–6075. GRIFFIN *v.* PRESCOTT. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 89–6079. JOLIVET *v.* BARNES, WARDEN. Sup. Ct. Utah. Certiorari denied. Reported below: 784 P. 2d 1148.

No. 89–6084. DEBARDELEBEN *v.* O'CONNOR, UNITED STATES DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied.

No. 89–6090. MASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1092.

No. 89–6094. LANG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1070.

No. 89–6096. VAUGHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1084.

No. 89–6097. PAIGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 998.

No. 89–6100. GOMETZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 256.

No. 89–6103. GREEN *v.* MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 887 F. 2d 259.

No. 89–6106. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 89–6109. BUTLER *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89–6111. BYNUM *v.* WOOD. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 550 So. 2d 468.

No. 89–6112. MAY *v.* PRO-GUARD, INC. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 75.

No. 89–6115. BARBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 266.

No. 89–6118. ALSTON *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 68.

No. 89–6122. DELUCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 883 F. 2d 1172.

No. 89–6128. CAMACHO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1268.

No. 89–6130. GAITO *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–6132. BRANNER *v.* FREDERICK COUNTY JAIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 862.

No. 89–6133. FOTOVICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 241.

No. 89–6135. CARTWRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 998.

No. 89–6136. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–6138. NOBLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1085.

No. 89–6141. PARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89–6145. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1092.

No. 89–6150. BARANY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1255.

No. 89–6151. RODRIGUEZ-AMPARO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89-6153. CAMBRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1387.

No. 89-6155. ROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1397.

No. 89-6161. WHITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89-6183. VERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89-6190. RESTREPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 1381.

No. 89-6201. EAGLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1093.

No. 89-6202. DORSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 79.

No. 89-6204. SENK *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 886 F. 2d 611.

No. 89-6209. RHODES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 1077.

No. 89-270. RICHARDSON *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 868 F. 2d 959.

No. 89-465. CUNNINGHAM *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Motion of Police Misconduct Lawyers Referral Service for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 879 F. 2d 481.

No. 89-481. MICHIGAN *v.* SESI. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 89-501. NORTHWESTERN INDIANA TELEPHONE CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part

in the consideration or decision of this petition. Reported below: 277 U. S. App. D. C. 30, 872 F. 2d 465.

No. 89–704. KROZSER, ADMINISTRATOR OF THE ESTATE OF KROZSER *v.* CONNECTICUT. Sup. Ct. Conn. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 212 Conn. 415, 562 A. 2d 1080.

No. 89–741. PRICE *v.* VIKING PENGUIN, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 881 F. 2d 1426.

No. 89–5666. LACKLAND *v.* J. C. PENNEY CO. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 89–749. PLAYTEX FAMILY PRODUCTS CORP. *v.* ST. PAUL SURPLUS LINES INSURANCE CO. ET AL. Sup. Ct. Kan. Motion of Product Liability Advisory Council, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 245 Kan. 258, 777 P. 2d 1259.

No. 89–784. SWANSON *v.* ELMHURST CHRYSLER PLYMOUTH, INC. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 882 F. 2d 1235.

No. 89–854. SILVERMAN, ADMINISTRATRIX, ESTATE OF SILVERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 859 F. 2d 1352.

No. 89–5697. ALLEY *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 89–5935. LESKO *v.* OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir.;

No. 89–6068. SPENCER *v.* VIRGINIA. Sup. Ct. Va.;

No. 89–6078. WALTON *v.* FLORIDA. Sup. Ct. Fla.; and

No. 89–6191. HEIDNIK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: No. 89–5697, 776 S. W. 2d 506; No. 89–5935, 881 F. 2d 44; No. 89–6068, 238 Va. 275, 384 S. E. 2d 775; No. 89–6078, 547 So. 2d 622.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89-6015. O'DELL *v.* ARMONTROUT. C. A. 8th Cir. Motion of petitioner to certify question to Supreme Court of Missouri denied. Certiorari denied. Reported below: 878 F. 2d 1076.

Rehearing Denied

No. — — ——. STOCKS *v.* UNITED STATES, *ante*, p. 948;

No. 88-42. HALLSTROM ET UX. *v.* TILLAMOOK COUNTY, *ante*, p. 20;

No. 88-2054. SMITH *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 821;

No. 88-2140. HANCOCK *v.* CITY OF DAVENPORT ET AL., *ante*, p. 826;

No. 88-7540. TAYLOR *v.* GREEN ET AL., *ante*, p. 841;

No. 88-7626. RIVERA *v.* OROWEAT FOODS CO., INC., ET AL., *ante*, p. 963;

No. 89-90. JUNGEN, ADMINISTRATRIX OF THE ESTATE OF JUNGEN, ET AL. *v.* OREGON, *ante*, p. 933;

No. 89-254. MARKER ET UX. *v.* RIESCHEL ET AL., *ante*, p. 893;

No. 89-294. GORDON ET AL. *v.* DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, *ante*, p. 918;

No. 89-342. SHERMAN *v.* NISSAN MOTOR CORP. ET AL., *ante*, p. 954;

No. 89-365. POLYAK *v.* STACK ET AL., *ante*, p. 944;

No. 89-384. BROWN ET AL. *v.* 1250 TWENTY-FOURTH STREET ASSOCIATES ET AL., *ante*, p. 935;

No. 89-494. IN RE SPARKS, *ante*, p. 963;

No. 89-584. IN RE MARIK, *ante*, p. 953;

No. 89-5041. HARRIS *v.* HALL ET AL., *ante*, p. 857;

No. 89-5106. HERRERA *v.* REDMAN, WARDEN, *ante*, p. 945;

No. 89-5115. STOTTS *v.* UNITED STATES, *ante*, p. 861;

No. 89-5361. BERTRAM *v.* UNITED STATES, *ante*, p. 956;

No. 89-5384. HURD *v.* DORSEY, WARDEN, *ante*, p. 897;

No. 89-5397. MAGWOOD *v.* ALABAMA, *ante*, p. 923;

No. 89-5428. SPYCHALA *v.* RUSHEN ET AL., *ante*, p. 939;

No. 89–5458. GALLAWAY *v.* UNITED STATES, *ante*, p. 898;
No. 89–5501. BROWN *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC., *ante*, p. 899;
No. 89–5522. OLIM *v.* SEARS, ROEBUCK & CO. ET AL., *ante*, p. 940;
No. 89–5528. BROOKS *v.* JOHNSON & JOHNSON, INC., *ante*, p. 940;
No. 89–5531. ZARRILLI *v.* MARINO, *ante*, p. 941;
No. 89–5570. MAY *v.* CHALLENGER COMMUNICATIONS SYSTEMS, INC., *ante*, p. 942;
No. 89–5576. GALA *v.* UNITED STATES POSTAL SERVICE, *ante*, p. 942;
No. 89–5593. RONDON *v.* INDIANA, *ante*, p. 969;
No. 89–5613. LOCKHART *v.* ROLLING ET AL., *ante*, p. 942;
No. 89–5615. MARTIN *v.* DELAWARE LAW SCHOOL OF WIDENER UNIVERSITY ET AL., *ante*, p. 966;
No. 89–5639. SPARKS *v.* SPARKS, *ante*, p. 957;
No. 89–5716. CORDEIRO *v.* UNITED STATES, *ante*, p. 958;
No. 89–5790. WATTS *v.* JOHNSON, WARDEN, ET AL., *ante*, p. 982; and
No. 89–5820. BOND *v.* JOHNSTONE ET AL., *ante*, p. 996. Petitions for rehearing denied.

No. 88–7050. KALLIEL *v.* UNITED STATES, *ante*, p. 827; and
No. 89–5184. RUTHERFORD *v.* UNITED STATES, *ante*, p. 895. Motions for leave to file petitions for rehearing denied.

No. 89–591. LEE *v.* BIDEN, UNITED STATES SENATOR, ET AL., *ante*, p. 984. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

JANUARY 16, 1990

Certiorari Granted—Vacated and Remanded

No. 88–2092. UNITED STATES *v.* SALAMONE. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dowling* v. *United States*, *ante*, p. 342. JUSTICE STEVENS dissents and would deny certiorari. Reported below: 869 F. 2d 221.

Miscellaneous Orders

No. A–498. SMITH *v.* ARMONTROUT, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application. The order heretofore entered by JUSTICE BLACKMUN is vacated.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

No. A–503. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC. *v.* UNITED DISTRIBUTION COS. ET AL. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE WHITE, and by him referred to the Court, granted, and the mandate is stayed pending the timely filing and disposition of the petitions for writs of certiorari. If the petitions for writs of certiorari are denied, this order terminates automatically. Should the petitions for writs of certiorari be granted, this order is to remain in effect pending the sending down of the judgment of this Court.

No. D–811. IN RE DISBARMENT OF POWELL. Disbarment entered. [For earlier order herein, see *ante*, p. 886.]

No. D–812. IN RE DISBARMENT OF MAHSHIE. Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D–813. IN RE DISBARMENT OF KRAMER. Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D–825. IN RE DISBARMENT OF KOSLOW. David Solomon Koslow, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on November 6, 1989 [*ante*, p. 950], is hereby discharged.

No. D–826. IN RE DISBARMENT OF RUDD. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–827. IN RE DISBARMENT OF COGHLAN. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–849. IN RE DISBARMENT OF REINER. It is ordered that Edward Norman Reiner, of Alexandria, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–850. IN RE DISBARMENT OF MORRISON. It is ordered that James Robert Morrison III, of Alton, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–851. IN RE DISBARMENT OF DWORKIN. It is ordered that Edwin Lawrence Dworkin, of Randallstown, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–852. IN RE DISBARMENT OF VOORHIES. It is ordered that Peter Gordon Voorhies, of Portland, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–853. IN RE DISBARMENT OF JONES. It is ordered that Richard D. Jones, of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–1480. REVES ET AL. *v.* ARTHUR YOUNG & CO. C. A. 8th Cir. [Certiorari granted, 490 U. S. 1105.] Motion of respondent to substitute Ernst & Young as respondent in place of Arthur Young & Co. granted.

No. 88–2018. ILLINOIS *v.* RODRIGUEZ. App. Ct. Ill., 1st Dist. [Certiorari granted, *ante*, p. 932.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–390. PENSION BENEFIT GUARANTY CORPORATION *v.* LTV CORP. ET AL. C. A. 2d Cir. [Certiorari granted, *ante*,

p. 932.] Motion of Bethlehem Steel Corp. et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of respondents David H. Miller and William W. Shaffer for divided argument denied. Motion of respondent LTV Bank Group for divided argument and for additional time for oral argument denied. Motion of respondent Official Committee of Unsecured Creditors of LTV Steel Co., Inc., and Certain Affiliates for divided argument denied. Motion of respondent Official Parent Creditors' Committee of the LTV Corp. for divided argument denied. Motion of respondent BancTexas, Dallas, N. A., for divided argument denied.

No. 89-401. WECHT, PRESIDENT OF THE ALLEGHENY COUNTY BOARD OF PRISON INSPECTORS, ET AL. *v.* INMATES OF THE ALLEGHENY COUNTY JAIL ET AL., *ante*, p. 948. Motion of respondents to retax costs granted.

No. 89-753. ANGELONE, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* DEUTSCHER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 89-6175. IN RE BROWN. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 88-2109. KANSAS ET AL. *v.* KANSAS POWER & LIGHT CO. ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 866 F. 2d 1286.

No. 89-260. IDAHO *v.* WRIGHT. Sup. Ct. Idaho. Certiorari granted. Reported below: 116 Idaho 382, 775 P. 2d 1224.

No. 89-530. PORTLAND GOLF CLUB *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted. Reported below: 876 F. 2d 897.

No. 89-624. MAISLIN INDUSTRIES, U. S., INC., ET AL. *v.* PRIMARY STEEL, INC., ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 879 F. 2d 400.

No. 89-478. MARYLAND *v.* CRAIG. Ct. App. Md. Motions of National Association of Counsel for Children et al. and People Against Child Abuse, Inc., et al. for leave to file briefs as *amici curiae* granted. Motion of respondent for leave to proceed *in*

forma pauperis granted. Certiorari granted. Reported below: 316 Md. 551, 560 A. 2d 1120.

No. 89–640. LUJAN, SECRETARY OF THE INTERIOR, ET AL. *v.* NATIONAL WILDLIFE FEDERATION ET AL. C. A. D. C. Cir. Motion of American Farm Bureau Federation et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 278 U. S. App. D. C. 320, 878 F. 2d 422.

No. 89–789. ALABAMA *v.* WHITE. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 550 So. 2d 1074.

No. 89–5809. SAWYER *v.* SMITH, INTERIM WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 881 F. 2d 1273.

Certiorari Denied

No. 88–1865. ARIZONA *v.* BAUER ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 159 Ariz. 443, 768 P. 2d 175.

No. 88–1884. ILLINOIS *v.* SEQUOIA BOOKS, INC., ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 127 Ill. 2d 271, 537 N. E. 2d 302.

No. 88–2062. COTTON *v.* BABCOCK, DIRECTOR, MICHIGAN DEPARTMENT OF SOCIAL SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 1241.

No. 89–296. NELSON *v.* FARREY. C. A. 7th Cir. Certiorari denied. Reported below: 874 F. 2d 1222.

No. 89–427. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* LONG ISLAND RAILROAD CO. ET AL.; and

No. 89–674. LONG ISLAND RAILROAD CO. ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 874 F. 2d 901.

No. 89–503. WALLACE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 388.

No. 89–511. KWALLEK *v.* ENDELL, COMMISSIONER, DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89-521. TRANSOIL (JERSEY), LTD., ET AL. *v.* REX OIL, LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 82.

No. 89-523. BERMUDA STAR LINE, INC. *v.* MARKOZANNES. Sup. Ct. La. Certiorari denied. Reported below: 545 So. 2d 537.

No. 89-534. FOXMEYER CORP. ET AL. *v.* STONE'S PHARMACY, INC. C. A. 8th Cir. Certiorari denied. Reported below: 875 F. 2d 665.

No. 89-538. LITTLEWOLF ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 270, 877 F. 2d 1058.

No. 89-554. HENNEPIN COUNTY, MINNESOTA, ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 13, 883 F. 2d 85.

No. 89-617. TEXARKANA NATIONAL BANK *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 264.

No. 89-631. PHILPOT ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 871 F. 2d 902 and 881 F. 2d 866.

No. 89-651. BURRELL ET AL. *v.* CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 209 Cal. App. 3d 568, 257 Cal. Rptr. 427.

No. 89-655. DAVIES *v.* SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 78.

No. 89-662. MIDDLE EARTH GRAPHICS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1027.

No. 89-664. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AIRLINE DIVISION, ET AL. *v.* SOUTHWEST AIRLINES CO. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 1129.

No. 89–666. WEST VIRGINIA STATE MEDICAL ASSN. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 123.

No. 89–672. CHURCH UNIVERSAL & TRIUMPHANT, INC., ET AL. *v.* WITT, EXECUTRIX OF THE ESTATE OF MULL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–677. ROE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 148, 877 F. 2d 83.

No. 89–689. DUGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 632.

No. 89–695. WISHART *v.* FLORIDA BAR ASSN. Sup. Ct. Fla. Certiorari denied. Reported below: 543 So. 2d 1250.

No. 89–747. CHICAGO CABLE COMMUNICATIONS ET AL. *v.* CHICAGO CABLE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 1540.

No. 89–756. BROTHERHOOD OF RAILROAD SIGNALMEN, AFL–CIO, ET AL. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 778.

No. 89–763. FERDINAND *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 164.

No. 89–780. SMITH ET AL. *v.* STONEKING. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 720.

No. 89–782. SMITH ET AL. *v.* SOWERS. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 262.

No. 89–783. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS *v.* TRANS WORLD AIRLINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 254.

No. 89–787. HEDICKE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 779 S. W. 2d 837.

No. 89–791. MCGEE ET AL. *v.* INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–793. STRAUCH *v.* GATES RUBBER CO. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 2d 1282.

No. 89–797. PIERCE ET AL. *v.* COMMERCIAL WAREHOUSE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 86.

No. 89–799. MAHSHIE *v.* GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT, STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 145 App. Div. 2d 164, 538 N. Y. S. 2d 121.

No. 89–801. CONSUMER VALUE STORES *v.* BOARD OF PHARMACY OF NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 116 N. J. 490, 561 A. 2d 1160.

No. 89–802. GOLDMAN, SACHS & CO. ET AL. *v.* UTLEY. C. A. 1st Cir. Certiorari denied. Reported below: 883 F. 2d 184.

No. 89–803. HEAD *v.* HEAD. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 89–807. CLINE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 83.

No. 89–812. ROBERTS *v.* BREA HOSPITAL NEUROPSYCHIATRIC CENTER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–813. SHIPMAN *v.* MISSOURI DIVISION OF CHILD SUPPORT ENFORCEMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 678.

No. 89–814. CENTRAL GULF LINES, INC. *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 1058.

No. 89–816. CITY OF LOS ANGELES ET AL. *v.* UNITED FIREFIGHTERS OF LOS ANGELES CITY, LOCAL 112, IAFF, AFL–CIO, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 210 Cal. App. 3d 1095, 259 Cal. Rptr. 65.

No. 89–817. SERVICE BUSINESS FORMS INDUSTRIES, INC., ET AL. *v.* GREENBERG ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 882 F. 2d 1538.

No. 89–821. SHORES, EXECUTOR OF THE ESTATE OF BISHOP *v.* SKLAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 760.

No. 89–823. LAYNE ET UX. *v.* COUNTY OF SAN MATEO, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–834. SMITH *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 895.

No. 89–836. CRANE ET AL. *v.* CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, DBA CONTINENTAL TELEPHONE COMPANY OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 105 Nev. 399, 775 P. 2d 705.

No. 89–845. ROTHBURY INVESTMENTS, LTD. *v.* DURA SYSTEMS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 886 F. 2d 551.

No. 89–880. FLEMING *v.* CANNON, JUDGE, EL PASO COUNTY DISTRICT COURT, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–923. BALL ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 216, 565 A. 2d 1143.

No. 89–926. MCGEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 418.

No. 89–5543. REYNOLDS *v.* BUTLER, SHERIFF, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–5680. PITRE *v.* NECAISE ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 544 So. 2d 1197.

No. 89–5689. HUERTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 878 F. 2d 89.

No. 89–5723. CHAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 546 So. 2d 1094.

No. 89–5729. MADSEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 772 S. W. 2d 656.

No. 89–5762. VASQUEZ, AKA GUZMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 1515.

No. 89–5784. BOWYER *v.* UNITED STATES AIR FORCE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 875 F. 2d 632.

No. 89-5797. RONEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-5814. GREY BEAR ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 883 F. 2d 1382.

No. 89-5817. DENNIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 879.

No. 89-5827. MORGAN *v.* TURNAGE. C. A. 8th Cir. Certiorari denied.

No. 89-5833. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 885.

No. 89-5855. RASHE *v.* SCHWARZER. C. A. 9th Cir. Certiorari denied.

No. 89-5928. MOORE *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 89-5930. AYARZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 874 F. 2d 647.

No. 89-6002. SPANN, AS NEXT FRIEND FOR SPANN, A MINOR *v.* JONES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 437.

No. 89-6019. KIM *v.* PRINTEMPS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6026. GRAVES *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 89-6034. MAURER *v.* LOS ANGELES COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 318.

No. 89-6039. DAVIS *v.* VITATOE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1392.

No. 89-6042. MCCULLOUGH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 77.

No. 89-6044. COLLIER *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1091.

No. 89-6045. FAVORS *v.* HICKS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 1075.

No. 89-6046. HARRIS *v.* JENNINGS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 873 F. 2d 1438.

No. 89-6047. CLAUSO *v.* BEYER, SUPERINTENDENT, NEW JERSEY PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1379.

No. 89-6049. BREWSTER *v.* LEGURSKY, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 89-6060. WALKER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 89-6067. VISSER *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 89-6081. HEARD *v.* GREEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 89-6082. JENKINS *v.* BEYERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 89-6086. JONES *v.* DELOACH, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 78.

No. 89-6087. MAHDAVI *v.* SAN FRANCISCO SUPERIOR COURT. Sup. Ct. Cal. Certiorari denied.

No. 89-6093. MCMILLIAN *v.* JOHNSON. C. A. 11th Cir. Certiorari denied.

No. 89-6095. POWERS *v.* SOUTH DAKOTA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89-6098. MARTIN *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT. C. A. 3d Cir. Certiorari denied.

No. 89-6102. COUTIN *v.* PRESIDENT OF HASTINGS COLLEGE OF LAW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1438.

No. 89-6116. CLARK *v.* PEABODY ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–6117. ANDREGG *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1023.

No. 89–6120. CORIZ *v.* TANSY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6129. ESPINO *v.* WORKERS' COMPENSATION APPEALS BOARD. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–6170. DEERING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89–6217. PUENTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1085.

No. 89–6225. GRAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1317.

No. 89–6228. ELZY *v.* SMITH, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–6234. DRAKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 323.

No. 89–6235. MARTINEZ-QUINONEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 892.

No. 89–6241. URZOLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 274.

No. 89–6245. LOTT ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1324.

No. 88–7533. BERRYHILL *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to file amended petition for writ of certiorari granted. Certiorari denied. Reported below: 880 F. 2d 275.

No. 89–266. PORTLAND GENERAL ELECTRIC CO. *v.* MONTANA DEPARTMENT OF REVENUE ET AL. Sup. Ct. Mont. Motions of Pacific Gas & Electric Co. et al. and Mountain States Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 237 Mont. 324, 773 P. 2d 1189.

No. 89-364. PACIFIC POWER & LIGHT CO. ET AL. *v.* MONTANA DEPARTMENT OF REVENUE ET AL. Sup. Ct. Mont. Motion of Mountain States Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 237 Mont. 77, 773 P. 2d 1176.

No. 89-524. SAMMILINE CO., LTD., ET AL. *v.* WOODS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 873 F. 2d 842.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

The Fifth Circuit held in this case that, based on its duties to longshoremen outlined in *Scindia Steam Navigation Co.* v. *De los Santos*, 451 U. S. 156 (1981), a vessel can be held liable under § 5(b) of the Longshore and Harbor Workers' Compensation Act, as added, 86 Stat. 1263, and amended, 33 U. S. C. § 905(b) (1982 ed., Supp. V), for injuries to a longshoreman unloading a vessel caused by the defective stowage of cargo by an independent stevedore. 873 F. 2d 842, 846–849 (1989). As recognized by the court below, *id.*, at 848, the Third Circuit has held that a shipowner cannot be held liable for such injuries. See *Derr* v. *Kawasaki Kisen K. K.*, 835 F. 2d 490 (1987), cert. denied, 486 U. S. 1007 (1988).

The Fifth Circuit also reaffirmed its holding in *D/S Ove Skou* v. *Hebert*, 365 F. 2d 341 (1966), that a standard time charter clause (providing: "'The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the Captain. . . .'") does not shift operational control over cargo operations, and therefore responsibility for the actions of independent stevedores, from the shipowner to the time charterer. 873 F. 2d, at 856. The court acknowledged, *id.*, at 857, n. 18, that its reaffirmance of *Ove Skou* perpetuates a conflict with the Ninth and Second Circuits, which have held that that contractual language does shift operational control over cargo operations to the time charterer. See *Turner* v. *Japan Lines, Ltd.*, 651 F. 2d 1300, 1305–1306 (CA9 1981), cert. denied, 459 U. S. 967 (1982); *Fernandez* v. *Chios Shipping Co.*, 542 F. 2d 145, 151–153 (CA2 1976).

I would grant certiorari to resolve these conflicts.

No. 89–729. ABBOTT ET AL. *v.* CITY OF VIRGINIA BEACH. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 879 F. 2d 132.

No. 89–767. HARRIS *v.* PULLEY, WARDEN. C. A. 9th Cir.;

No. 89–5527. KIRKPATRICK *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir.;

No. 89–5847. GRIFFIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.; and

No. 89–6113. COLEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 89–767, 885 F. 2d 1354; No. 89–5527, 870 F. 2d 276; No. 89–5847, 874 F. 2d 1397; No. 89–6113, 45 Ohio St. 3d 298, 544 N. E. 2d 622.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–5715. CHINAGORAM, AKA GODWIN *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner to amend petition for writ of certiorari granted. Certiorari denied. Reported below: 878 F. 2d 380.

Rehearing Denied

No. 88–7466. SPEARMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 876;

No. 88–7467. SPEARMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 876;

No. 89–489. SMITH *v.* MASSACHUSETTS INSTITUTE OF TECHNOLOGY ET AL., *ante*, p. 965;

No. 89–561. LARAIA *v.* PHILLIS ET AL., *ante*, p. 965;

No. 89–5647. HOLBROOK *v.* WILLIAMS, WARDEN, ET AL., *ante*, p. 967; and

No. 89–5798. BLANKS *v.* KEMP, WARDEN, *ante*, p. 984. Petitions for rehearing denied.

JANUARY 17, 1990

Dismissal Under Rule 46

No. 89–760. SANTA FE SOUTHERN PACIFIC CORP. ET AL. *v.* KRAUS ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 878 F. 2d 1193.

Miscellaneous Order

No. A–498. SMITH *v.* ARMONTROUT, WARDEN, *ante*, p. 1039. Motion of the Missouri Capital Punishment Resource Center for leave to intervene as next friend and for reconsideration of application for stay of execution denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the motion and the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

JANUARY 22, 1990

Affirmed on Appeal

No. 89–400. LUCAS ET AL. *v.* TOWNSEND, PRESIDENT OF THE BIBB COUNTY BOARD OF EDUCATION, ET AL. Affirmed on appeal from D. C. M. D. Ga. Reported below: 732 F. Supp. 1581.

Miscellaneous Orders

No. — — ——. FALLIN *v.* CUNNINGHAM ET AL. Motion for leave to file copies of petition for writ of certiorari and appendix separately and out of time denied. JUSTICE BLACKMUN would grant the motion.

No. — — ——. GRANVIEL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. LINDSEY *v.* LOUISIANA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. MITCHELSON *v.* KEMMERER COAL CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–488. NELSON *v.* JONES. Super. Ct. Alaska, 1st Jud. Dist. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–814. IN RE DISBARMENT OF BERNSTEIN. Disbarment entered. [For earlier order herein, see *ante*, p. 949.]

No. D–820. IN RE DISBARMENT OF MCDONNELL. Disbarment entered. [For earlier order herein, see *ante*, p. 949.]

No. D–822. IN RE DISBARMENT OF MASTERS. Disbarment entered. [For earlier order herein, see *ante*, p. 950.]

No. D–828. IN RE DISBARMENT OF KAVANAUGH. Disbarment entered. [For earlier order herein, see *ante*, p. 960.]

No. D–830. IN RE DISBARMENT OF NICHOLSON. Disbarment entered. [For earlier order herein, see *ante*, p. 961.]

No. D–831. IN RE DISBARMENT OF BRASS. Disbarment entered. [For earlier order herein, see *ante*, p. 961.]

No. D–832. IN RE DISBARMENT OF BATKIN. Disbarment entered. [For earlier order herein, see *ante*, p. 961.]

No. D–835. IN RE DISBARMENT OF THORP. Disbarment entered. [For earlier order herein, see *ante*, p. 961.]

No. D–854. IN RE DISBARMENT OF MCCALLUM. It is ordered that Thomas J. McCallum, of Fraser, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–855. IN RE DISBARMENT OF RIVAS. It is ordered that Fred Rivas, of Chino, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $3,761.73 for the period July 1 through December 31, 1989, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 929.]

No. 74, Orig. GEORGIA *v.* SOUTH CAROLINA. Accounting of the Special Master for expenses approved, and the Special Master is hereby discharged. [For earlier order herein, see, *e. g.*, *ante*, p. 1014.]

No. 88–1972. ILLINOIS *v.* PERKINS. App. Ct. Ill., 5th Dist. [Certiorari granted, *ante*, p. 808.] Motion of Daniel M. Kirwan to vacate order of Court entered October 30, 1989 [*ante*, p. 930], and to appoint substitute counsel granted, and it is ordered that Dan W. Evers, Esq., of Mount Vernon, Ill., be appointed to serve as counsel for respondent in this case.

No. 89–275. COOTER & GELL *v.* HARTMARX CORP. ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 916.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 89–350. LANTANA CASCADE OF PALM BEACH, LTD. *v.* LANCA HOMEOWNERS, INC., *ante*, p. 964. Motion of respondent to tax appellate costs and to award appellate legal fees denied.

No. 89–386. PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY; and PORT AUTHORITY TRANS-HUDSON CORP. *v.* FOSTER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 932.] Motion of Pan American World Airways, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 89–789. ALABAMA *v.* WHITE. Ct. Crim. App. Ala. [Certiorari granted, *ante*, p. 1042.] Motion of respondent for appointment of counsel granted, and it is ordered that David B. Byrne, Jr., Esq., of Montgomery, Ala., be appointed to serve as counsel for respondent in this case.

No. 89–894. CONNOLLY, SECRETARY OF STATE OF MASSACHUSETTS, ET AL. *v.* SECURITIES INDUSTRY ASSN. ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–6168. LAYMAN *v.* ALABAMA HIGHWAY DEPARTMENT ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 12, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari with-

out reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 89–152. ENGLISH *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. Certiorari granted. Reported below: 871 F. 2d 22.

No. 89–504. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* FINKELSTEIN. C. A. 3d Cir. Certiorari granted. Reported below: 869 F. 2d 215.

No. 89–601. COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. *v.* JEAN ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 863 F. 2d 759.

No. 89–645. MILKOVICH *v.* LORAIN JOURNAL CO. ET AL. Ct. App. Ohio, Lake County. Certiorari granted. Reported below: 46 Ohio App. 3d 20, 545 N. E. 2d 1320.

No. 88–2041. SISSON *v.* RUBY ET AL. C. A. 7th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. In addition the parties are requested to brief and argue the question whether or not the Court should reconsider its decision in *Richardson* v. *Harmon*, 222 U. S. 96 (1911). Reported below: 867 F. 2d 341.

Certiorari Denied

No. 88–2117. INCOME SECURITY CORP., INC., ET AL. *v.* LOUISIANA OILFIELD CONTRACTORS ASSN., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 119.

No. 89–444. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL.;

No. 89–566. NATIONAL TREASURY EMPLOYEES UNION *v.* DEPARTMENT OF THE TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.; and

No. 89–853. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF THE TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 236, 884 F. 2d 1446.

No. 89–610. NATIONAL TREASURY EMPLOYEES UNION *v.* DEPARTMENT OF THE TREASURY, OFFICE OF CHIEF COUNSEL, ET AL.; and

No. 89–758. FEDERAL LABOR RELATIONS AUTHORITY *v.* DEPARTMENT OF THE TREASURY, OFFICE OF CHIEF COUNSEL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 210, 873 F. 2d 1467.

No. 89–616. SCHOENFIELD *v.* COUNTY OF HUMBOLDT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 870.

No. 89–635. NATIONAL FEDERATION OF FEDERAL EMPLOYEES *v.* CHENEY, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 164, 884 F. 2d 603.

No. 89–671. AMERICAN INSURANCE CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 590.

No. 89–679. BELL ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 382, 878 F. 2d 484.

No. 89–690. HURWITZ *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 684.

No. 89–751. WILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89–786. CARRUTHERS, GOVERNOR OF NEW MEXICO, ET AL. *v.* DURAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 885 F. 2d 1485.

No. 89–819. COLLINS ET AL. *v.* WOMANCARE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1145.

No. 89–825. ENGLISH ET UX., INDIVIDUALLY AND AS GUARDIANS OF ENGLISH *v.* NEW ENGLAND MEDICAL CENTER HOSPITAL, INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 423, 541 N. E. 2d 329.

No. 89–826. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, CALIFORNIA *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893.

No. 89-827. CAMERON *v.* CORBIN, ATTORNEY GENERAL OF ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 334.

No. 89-837. SWANCO INSURANCE COMPANY-ARIZONA *v.* HAGER, COMMISSIONER OF INSURANCE OF IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 2d 353.

No. 89-844. MICHIGAN BELL TELEPHONE CO. *v.* CLEARY. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 1321.

No. 89-850. CRONSON, AUDITOR GENERAL OF ILLINOIS *v.* CHICAGO BAR ASSN. ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 127 Ill. 2d 613, 545 N. E. 2d 106.

No. 89-855. O'NEILL *v.* ELLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 69.

No. 89-860. ESTATE OF BREES *v.* HAMPTON, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 278 U. S. App. D. C. 176, 877 F. 2d 111.

No. 89-863. HARPER ET UX. *v.* FEDERAL LAND BANK OF SPOKANE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1172.

No. 89-864. MIAMI CENTER LIMITED PARTNERSHIP ET AL. *v.* SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1086.

No. 89-868. LUM *v.* JENSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 1385.

No. 89-873. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 868.

No. 89-881. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 2d 1099.

No. 89-883. TECHNOLOGY FOR ENERGY CORP. *v.* RADCAL ENGINEERING, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 875.

No. 89–884. CRAWFORD *v.* WORKERS' COMPENSATION APPEALS BOARD. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 213 Cal. App. 3d 156, 259 Cal. Rptr. 414.

No. 89–885. AIR-SEA FORWARDERS, INC. *v.* AIR ASIA CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 176.

No. 89–886. ROBERTS ET AL. *v.* THOMAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1395.

No. 89–896. RED BARON-FRANKLIN PARK, INC., ET AL. *v.* TAITO CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 275.

No. 89–897. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 869 F. 2d 1495.

No. 89–899. LANTECH, INC. *v.* KAUFMAN COMPANY OF OHIO, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1446.

No. 89–900. SUFFOLK COUNTY TREASURER *v.* BARR, AS TRUSTEE OF PARR MEADOWS RACING ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1540.

No. 89–904. FORRESTER *v.* OHIO. Ct. App. Ohio, Morgan County. Certiorari denied.

No. 89–918. TEXAS *v.* WEST PUBLISHING CO. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 2d 171.

No. 89–921. CROWN ROLL LEAF, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1382.

No. 89–924. GOULD ET AL. *v.* ALLECO, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 281.

No. 89–945. WEDGE GROUP INC. *v.* THIRD NATIONAL BANK IN NASHVILLE. C. A. 6th Cir. Certiorari denied. Reported below: 882 F. 2d 1087.

No. 89–955. DEREWAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 263.

No. 89-962. STORY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 1377.

No. 89-5408. SOTO *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 55.

No. 89-5452. WEAVER *v.* SHEAFFER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 58.

No. 89-5609. DUNN *v.* WHITE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 880 F. 2d 1188.

No. 89-5701. PERCEVAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-5747. JENKINS *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 874 F. 2d 992.

No. 89-5761. MUNNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 515.

No. 89-5768. SLADER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89-5822. SOSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89-5828. CREEL *v.* DISTRICT ATTORNEY OF MEDINA COUNTY, TEXAS, ET AL. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 89-5856. MILANO *v.* JOHNSON, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1069.

No. 89-5861. SILVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 387.

No. 89-5871. PIERCE *v.* UNITED STATES; and
No. 89-5873. LANE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 883 F. 2d 1484.

No. 89-5883. MCKEE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 548 So. 2d 667.

No. 89-5893. SANTOS *v.* KOLB, SUPERINTENDENT, FOX LAKE CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 880 F. 2d 941.

No. 89–5904. MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 513.

No. 89–5914. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 113.

No. 89–6040. MORALES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 862 F. 2d 321.

No. 89–6088. WALKER *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 872 F. 2d 1022.

No. 89–6089. BROWN *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1084.

No. 89–6121. WASHINGTON *v.* BUMGARNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 899.

No. 89–6124. FERENC *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89–6125. CLARK *v.* COUNTY OF GARFIELD, COLORADO. C. A. 10th Cir. Certiorari denied.

No. 89–6127. COLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 2d 1052, 544 N. Y. S. 2d 405.

No. 89–6131. CLARK *v.* DUGGER, DIRECTOR, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89–6142. POOLE *v.* OHIO. Ct. App. Ohio, Allen County. Certiorari denied.

No. 89–6147. WILLIS *v.* FIRST BANK NATIONAL ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 1437.

No. 89–6149. HILLIARD *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 71.

No. 89–6159. RANDALL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1389.

No. 89-6163. HILL *v.* INTERNATIONAL HARVESTER CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1081.

No. 89-6164. KERN *v.* JACKSON, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89-6167. LAIRD *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 89-6171. CASE *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS. Ct. App. Minn. Certiorari denied.

No. 89-6173. BYNUM *v.* FLORIDA BAR. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 89-6174. BYNUM *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 545 So. 2d 1370.

No. 89-6177. BRANHAM *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1391.

No. 89-6179. JORDAN *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 884 F. 2d 1398.

No. 89-6180. WILBORNE *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-6182. ROGERS *v.* HILLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 252.

No. 89-6188. DESIRE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6193. KHALID *v.* KUBACKI, JUDGE, COURT OF COMMON PLEAS FOR THE CITY OF PHILADELPHIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 261.

No. 89-6195. NELSON *v.* BOWER, SUPERINTENDENT, OHIO SOUTHEASTERN CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 1436.

No. 89-6197. TYLER *v.* MOSS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1093.

No. 89–6199. BOND *v.* RAIKES, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 265.

No. 89–6220. YKEMA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 697.

No. 89–6224. BOND *v.* RAIKES, JUDGE, NELSON CIRCUIT COURT. Sup. Ct. Ky. Certiorari denied.

No. 89–6237. VINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 886 F. 2d 740.

No. 89–6242. WATSON *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89–6249. FURST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 886 F. 2d 558.

No. 89–6254. EHRET *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 2d 441.

No. 89–6257. BIONDI *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 307.

No. 89–6263. MANNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 89, 887 F. 2d 317.

No. 89–6269. BEAULIEU *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 330.

No. 89–589. CBS INC. *v.* BERDA ET UX. C. A. 3d Cir. Motions of Merchants and Manufacturers Association and General Motors Corp. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 881 F. 2d 20.

No. 89–838. PINCKNEY ET AL. *v.* VALENTE-KRITZER VIDEO. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 881 F. 2d 772.

No. 89–857. CBS INC. *v.* BRUNO. C. A. 3d Cir. Motion of Merchants and Manufacturers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 882 F. 2d 760.

No. 89–866. CONNECTICUT *v.* D'AMBROSIA. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 212 Conn. 50, 561 A. 2d 422.

No. 89–871. KENTUCKY *v.* WALLS; and
No. 89–872. KENTUCKY *v.* COSBY. Sup. Ct. Ky. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 776 S. W. 2d 367.

No. 89–5580. MESSIAH *v.* LOUISIANA. Sup. Ct. La.;
No. 89–6107. BUCHANAN *v.* VIRGINIA. Sup. Ct. Va.; and
No. 89–6244. KLOKOC *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 89–5580, 538 So. 2d 175; No. 89–6107, 238 Va. 389, 384 S. E. 2d 757.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–7274. ALSTON *v.* EDWARDS, *ante*, p. 830;
No. 88–7361. ALSTON *v.* GLUCH, WARDEN, *ante*, p. 833;
No. 88–7476. ALSTON *v.* GLUCH, WARDEN, ET AL., *ante*, p. 837;
No. 88–7519. ALSTON *v.* GLUCH, WARDEN, *ante*, p. 840;
No. 89–284. LOFTUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL., *ante*, p. 991;
No. 89–434. JULIEN *v.* BAKER, *ante*, p. 955;
No. 89–5122. RADEMAKER *v.* VETERANS ADMINISTRATION, *ante*, p. 861;
No. 89–5670. BARELA *v.* BAKER, SECRETARY OF STATE, *ante*, p. 979;
No. 89–5718. RICHARDSON *v.* ARNOLD ET AL., *ante*, p. 980;
No. 89–5728. PREUSS *v.* DISTRICT OF COLUMBIA ET AL., *ante*, p. 980;
No. 89–5736. KIMELMAN *v.* CITY OF COLORADO SPRINGS ET AL., *ante*, p. 981;
No. 89–5779. JOHNS *v.* YEE, *ante*, p. 995;
No. 89–5782. FLANERY *v.* UNITED STATES, *ante*, p. 981;

No. 89–5843. SMITH *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY AT PARCHMAN, *ante*, p. 997;

No. 89–5917. NOE *v.* UNITED STATES, *ante*, p. 1005; and

No. 89–5953. IN RE STULL ET AL., *ante*, p. 990. Petitions for rehearing denied.

No. 88–1083. JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP., *ante*, p. 146. Respondent's petition for rehearing to modify and clarify the decision on the merits denied.

No. 89–200. OFMAN *v.* UNITED STATES, *ante*, p. 933; and

No. 89–5131. NICHOLAS *v.* UNITED STATES, *ante*, p. 861. Motions for leave to file petitions for rehearing denied.

JANUARY 23, 1990

Dismissals Under Rule 46

No. 89–831. PELICAN PRODUCTION CORP. *v.* MAR-SHER EXPLORATION, INC., ET AL. Sup. Ct. Okla. Certiorari dismissed under this Court's Rule 46.

No. 89–153. ROYAL SERVICE, INC. *v.* GOODY PRODUCTS, INC. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 865 F. 2d 1271.

JANUARY 26, 1990

Miscellaneous Order. (For the Court's order prescribing amendments to the Federal Rules of Evidence, see *post*, p. 1175.)

FEBRUARY 6, 1990

Dismissal Under Rule 46

No. 89–849. WESTINGHOUSE ELECTRIC CORP. *v.* VERBRAEKEN. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 881 F. 2d 1041.

FEBRUARY 8, 1990

Miscellaneous Orders

No. A–537 (89–6347). SMITH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court,

denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

FEBRUARY 13, 1990

Dismissal Under Rule 46

No. 89-996. CITY OF GEORGETOWN, TEXAS, ET AL. *v.* TEMPLO MONTE SINAI, INC., ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 886 F. 2d 1312.

FEBRUARY 20, 1990

Dismissals Under Rule 46

No. 89-1031. MEIJER, INC., ET AL. *v.* FRANKENMUTH MUTUAL INSURANCE CO., INDIVIDUALLY AND/OR AS SUBROGEE OF GOLEMBIEWSKI. Ct. App. Mich. Certiorari dismissed under this Court's Rule 46. Reported below: 176 Mich. App. 675, 440 N. W. 2d 7.

No. 89-6143. KENDRICK, GUARDIAN AD LITEM FOR KENDRICK, A MINOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 877 F. 2d 1201.

Appeal Dismissed

No. 89-935. LIVELY EXPLORATION CO. ET AL. *v.* VALERO TRANSMISSION CO. Appeal from Ct. App. Tex., 4th Dist., dismissed for want of substantial federal question. Reported below: 751 S. W. 2d 649.

Miscellaneous Orders

No. — — ——. HENDERSON *v.* BANK OF NEW ENGLAND. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. WALLS *v.* DELAWARE STATE POLICE ET AL. Motion to direct the Clerk to file petition for writ of certiorari

out of time denied. JUSTICE BLACKMUN dissents and would grant the motion.

No. A–502 (89–6213). LUCKY *v.* VASQUEZ, WARDEN. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

No. A–519. ENGLISH *v.* CITY OF ATLANTIC CITY ET AL. Application for injunction, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–837. IN RE DISBARMENT OF MARCONE. Disbarment entered. [For earlier order herein, see *ante*, p. 972.]

No. D–852. IN RE DISBARMENT OF VOORHIES. Peter Gordon Voorhies, of Portland, Ore., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 16, 1990 [*ante*, p. 1040], is hereby discharged.

No. D–856. IN RE DISBARMENT OF SANDS. It is ordered that Barry Gerald Sands, of Torrance, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–857. IN RE DISBARMENT OF KAY. It is ordered that Robert L. Kay, of Bethesda, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–858. IN RE DISBARMENT OF LOUDEN. It is ordered that John R. Louden, of Dublin, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–859. IN RE DISBARMENT OF DAWES. It is ordered that Kenneth J. Dawes, Jr., of Trenton, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–860. IN RE DISBARMENT OF HIPP. It is ordered that David Charles Hipp, of Bolivar, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–861. IN RE DISBARMENT OF EISENBERG. It is ordered that Stuart A. Eisenberg, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–862. IN RE DISBARMENT OF HELLER. It is ordered that Melvin A. Heller, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–6700. SELVAGE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. [Certiorari granted *sub nom. Selvage* v. *Lynaugh*, *ante*, p. 888.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 88–1260. CITIBANK, N. A. *v.* WELLS FARGO ASIA LTD. C. A. 2d Cir. [Certiorari granted, *ante*, p. 990.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–5691. HUGHEY *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1018.] Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* granted.

No. 89–260. IDAHO *v.* WRIGHT. Sup. Ct. Idaho. [Certiorari granted, *ante*, p. 1041.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Rolf M.

Kehne, Esq., of Boise, Idaho, be appointed to serve as counsel for respondent in this case.

No. 89–333. CALIFORNIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 991.] Motion of respondent Rock Creek Limited Partnership for divided argument denied.

No. 89–386. PORT AUTHORITY TRANS-HUDSON CORP. *v.* FEENEY; and PORT AUTHORITY TRANS-HUDSON CORP. *v.* FOSTER. C. A. 2d Cir. [Certiorari granted, *ante*, p. 932.] Motion of American Airlines, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 89–867. F. & H. R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM ET AL. *v.* HARZA ENGINEERING CO. C. A. 7th Cir.; and

No. 89–989. CITY OF NORFOLK, VIRGINIA, ET AL. *v.* COLLINS ET AL. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–1221. MICHIGAN *v.* MOORE. Ct. App. Mich. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 89–6210. IN RE MILES;
No. 89–6236. IN RE MAXWELL;
No. 89–6250. IN RE HICKS; and
No. 89–6308. IN RE LYNCH. Petitions for writs of mandamus denied.

No. 89–6027. IN RE ABDUL-AKBAR; and
No. 89–6321. IN RE KLEINSCHMIDT. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–658. CHEEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 882 F. 2d 1263.

No. 89–1048. FMC CORP. *v.* HOLLIDAY. C. A. 3d Cir. Certiorari granted. Reported below: 885 F. 2d 79.

No. 89–5011. POWERS *v.* OHIO. Ct. App. Ohio, Franklin County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 89–5867. IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 874 F. 2d 1092.

Certiorari Denied

No. 88–5826. HAMILTON *v.* UNITED STATES;
No. 88–5827. HAMILTON *v.* UNITED STATES;
No. 88–5829. HAMILTON *v.* UNITED STATES;
No. 88–5832. BLAKE *v.* UNITED STATES; and
No. 88–5834. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 1038.

No. 88–7079. PEREZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 390.

No. 88–7374. TINSLEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–483. NORTHWEST LAND & INVESTMENT, INC., ET AL. *v.* NEW WEST FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 386.

No. 89–485. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 808.

No. 89–506. VIRGINIA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* UPCHURCH. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 1431.

No. 89–525. POPAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 880 F. 2d 1319.

No. 89–607. SMITH, EXECUTRIX OF THE ESTATE OF SMITH *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 40.

No. 89–649. ARANGO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 1501.

No. 89–675. AMBASE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 377.

No. 89–688. GENERAL AMERICAN TRANSPORTATION CORP. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C.

Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 78, 872 F. 2d 1048.

No. 89–696. NEVADA *v.* SKINNER, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 445.

No. 89–697. DOWNRIVER COMMUNITY FEDERAL CREDIT UNION ET AL. *v.* PENN SQUARE BANK, THROUGH ITS RECEIVER, FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari denied. Reported below: 879 F. 2d 754.

No. 89–699. COLORADO DEPARTMENT OF REVENUE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 873 F. 2d 242.

No. 89–711. UNIVERSAL FABRICATORS, INC. *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 878 F. 2d 843.

No. 89–715. OWEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 832.

No. 89–722. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 877 F. 2d 281.

No. 89–728. FIRST UNITED METHODIST CHURCH OF HYATTSVILLE, MARYLAND *v.* UNITED STATES GYPSUM CO. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 862.

No. 89–735. WILLIAMS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 28 M. J. 484.

No. 89–739. DAVIS ENTERPRISES ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 1181.

No. 89–748. SECURITIES INDUSTRY ASSN. *v.* CLARKE, COMPTROLLER OF THE CURRENCY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 885 F. 2d 1034.

No. 89–757. NEWAK *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 304.

No. 89–759. KOWALESKI ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPART-

MENT OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 1173.

No. 89–764. RAWLS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 323.

No. 89–779. SCHWIMMER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 882 F. 2d 22.

No. 89–785. ALAMO BANK OF TEXAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 880 F. 2d 828.

No. 89–800. ALVARADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 882 F. 2d 645.

No. 89–815. CHALINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 505.

No. 89–841. LEEF ET AL. *v.* MARTIN, ADMINISTRATRIX OF THE ESTATE OF MARTIN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 181 W. Va. 308, 382 S. E. 2d 502.

No. 89–843. AMERICAN CYANAMID CO. ET AL. *v.* O'NEIL, ATTORNEY GENERAL OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 883 F. 2d 176.

No. 89–846. SUAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 878.

No. 89–848. KELLY ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 192 Ga. App. 169, 384 S. E. 2d 197.

No. 89–851. NATIONAL FOOTBALL LEAGUE ET AL. *v.* UNITED STATES FOOTBALL LEAGUE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 408.

No. 89–858. HAPANIEWSKI ET AL. *v.* CITY OF CHICAGO HEIGHTS, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 883 F. 2d 576.

No. 89–859. MEDVIK *v.* OLLENDORFF ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 772 S. W. 2d 696.

No. 89–861. MORITA ET AL. *v.* APPLICATION ART LABORATORIES CO., LTD. C. A. Fed. Cir. Certiorari denied. Reported below: 883 F. 2d 1028.

No. 89–862. YOUNG ET VIR *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 882 F. 2d 633.

No. 89–874. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* RUSSELL. Sup. Ct. Ala. Certiorari denied. Reported below: 551 So. 2d 960.

No. 89–875. FELKER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 389 Pa. Super. 647, 560 A. 2d 825.

No. 89–887. SOUTHERN OHIO STATE EXECUTIVE OFFICES OF CHURCH OF GOD ET AL. *v.* FAIRBORN CHURCH OF GOD ET AL. Ct. App. Ohio, Green County. Certiorari denied. Reported below: 61 Ohio App. 3d 526, 573 N. E. 2d 172.

No. 89–891. CAMPOS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 181 Ill. App. 3d 1119, 553 N. E. 2d 453.

No. 89–903. DAVIS ET UX. *v.* FARASY ET AL. Ct. App. Md. Certiorari denied. Reported below: 316 Md. 364, 558 A. 2d 1206.

No. 89–905. MUSCOGEE COUNTY SCHOOL DISTRICT ET AL. *v.* MITTEN, BY AND THROUGH HER FATHER AND NEXT FRIEND, MITTEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 932.

No. 89–906. J. H. H. ET AL. *v.* O'HARA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 240.

No. 89–908. AUTOMOBILE CLUB OF MICHIGAN, AKA AAA, ET AL. *v.* BULLOCK. Sup. Ct. Mich. Certiorari denied. Reported below: 432 Mich. 472, 444 N. W. 2d 114.

No. 89–909. TAYLOR, DBA EXPLORATION SERVICES *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 207.

No. 89–911. CONSOLIDATED OIL & GAS, INC. *v.* SOUTHERN UNION CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 21, 857 F. 2d 812.

No. 89–912. BABCOCK, BY AND THROUGH HER GUARDIAN, BABCOCK, ET AL. *v.* TYLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 497.

No. 89–913. ETHERIDGE *v.* ANDREWS ET UX. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 549 So. 2d 1021.

No. 89–916. ILLINOIS *v.* KERNER. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 183 Ill. App. 3d 99, 538 N. E. 2d 1223.

No. 89–917. MIAMI CENTER LIMITED PARTNERSHIP ET AL. *v.* BANK OF NEW YORK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 418.

No. 89–919. SMITH MACHINERY CO., INC. *v.* HESSTON CORP. C. A. 10th Cir. Certiorari denied. Reported below: 878 F. 2d 1290.

No. 89–920. ESTREMERA *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89–925. TOVREA *v.* RAILROAD RETIREMENT BOARD ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–929. ABBOTT ET AL. *v.* GOULD, INC. Sup. Ct. Neb. Certiorari denied. Reported below: 232 Neb. 907, 443 N. W. 2d 591.

No. 89–932. ARRINGTON ET UX. *v.* MATTOX, ATTORNEY GENERAL OF TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 767 S. W. 2d 957.

No. 89–934. WOODARD ET AL. *v.* CITY OF FORT WORTH, TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 89–937. DE KLEINMAN *v.* RESIDENTIAL BOARD OF MANAGERS OF THE OLYMPIC TOWER CONDOMINIUM ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 89–938. PACYNA *v.* PACYNA. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 842, 545 N. E. 2d 872.

No. 89–942. ROOKER *v.* RIMER. Ct. App. Tenn. Certiorari denied. Reported below: 776 S. W. 2d 124.

No. 89–943. THOMAS J. KLINE, INC. *v.* LORILLARD, INC. C. A. 4th Cir. Certiorari denied. Reported below: 878 F. 2d 791.

No. 89–946. LAFITTE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 211 Cal. App. 3d 1429, 259 Cal. Rptr. 915.

No. 89–947. CURRAN, ATTORNEY GENERAL OF MARYLAND, ET AL. *v.* MULLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 54.

No. 89–949. AMERICAN HOME INSURANCE GROUP ET AL. *v.* AARON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 876 F. 2d 1157.

No. 89–950. UNITED TRANSPORTATION UNION *v.* BLANKENBAKER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 878 F. 2d 1235.

No. 89–951. MERRELL DOW PHARMACEUTICALS, INC. *v.* OXENDINE. Ct. App. D. C. Certiorari denied. Reported below: 563 A. 2d 330.

No. 89–952. UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE INSURANCE BENEFITS ET AL. *v.* MUSISKO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 885 F. 2d 1170.

No. 89–953. SAFIR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–956. SEARIGHT ET UX. *v.* CIMINO. Sup. Ct. Mont. Certiorari denied. Reported below: 238 Mont. 218, 777 P. 2d 335.

No. 89–957. TRANSPORTES DEL NORTE *v.* CLARK ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 774 S. W. 2d 644.

No. 89–958. FELTNER ET AL. *v.* FLEISCHHAUER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1290.

No. 89–959. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 289, 260 Cal. Rptr. 641.

No. 89–961. LAMON ET UX. *v.* CITY OF WESTPORT ET AL. Ct. App. Wash. Certiorari denied. Reported below: 44 Wash. App. 664, 723 P. 2d 470.

No. 89–963. ROGERS *v.* COUNTY OF HUMBOLDT, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 1439.

No. 89–965. RAFTER *v.* LIBERTY LINES TRANSIT, INC., ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 89–966. BIERMANN *v.* WREN, DIRECTOR, INTERNAL REVENUE SERVICE CENTER, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 973.

No. 89–967. MODI *v.* MODI. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–968. NEWSOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1088.

No. 89–969. WRENN *v.* LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 420.

No. 89–970. FIRST COMICS, INC. *v.* WORLD COLOR PRESS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 1033.

No. 89–971. RUSS BERRIE & CO., INC. *v.* ROULO. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 931.

No. 89–972. HUNSBERGER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 92, 565 A. 2d 152.

No. 89–974. PETROLEO BRASILEIRO, S. A. *v.* ATWOOD TURNKEY DRILLING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 875 F. 2d 1174.

No. 89–975. AL-MARAYATI *v.* UNIVERSITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 578.

No. 89–976. SUTTON *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 885 F. 2d 471.

No. 89–978. VON RUECKER *v.* HOLIDAY INNS, INC., ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 775 S. W. 2d 295.

No. 89-979. BAUSCH & LOMB INC. *v.* HEWLETT-PACKARD CO. C. A. Fed. Cir. Certiorari denied. Reported below: 882 F. 2d 1556.

No. 89-980. HEFTI ET UX. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 2d 311.

No. 89-981. GELBAND ET AL. *v.* TEXACO INC. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 140 App. Div. 2d 1013, 529 N. Y. S. 2d 929.

No. 89-982. SINDAK *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 116 Idaho 185, 774 P. 2d 895.

No. 89-983. ADAIR ET AL. *v.* CLAY ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 780 P. 2d 650.

No. 89-984. BUCKLEY LAND CORP. *v.* DEPARTMENT OF NATURAL RESOURCES OF MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 178 Mich. App. 249, 443 N. W. 2d 390.

No. 89-987. STANDARD OIL COMPANY OF CALIFORNIA ET AL. *v.* CITY OF LONG BEACH ET AL.; and

No. 89-990. EXXON CORP. ET AL. *v.* CITY OF LONG BEACH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 1401 and 886 F. 2d 246.

No. 89-988. CHEVRON CORP. ET AL. *v.* CITY OF LONG BEACH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 1410.

No. 89-991. THOMPSON *v.* SCHRODER, JUDGE, KENTON DISTRICT COURT. Cir. Ct. Ky., Kenton County. Certiorari denied.

No. 89-993. BRYANT *v.* FORD MOTOR CO. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1526.

No. 89-995. MEYER ET AL. *v.* FOWLER ET UX. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89-998. MITCHELL *v.* ASSOCIATED BUILDING CONTRACTORS OF N. W. OHIO, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1392.

No. 89-1000. KAPLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 536.

No. 89–1001. SWIN RESOURCE SYSTEMS, INC. *v.* LYCOMING COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 883 F. 2d 245.

No. 89–1003. MINERS ADVOCACY COUNCIL, INC. *v.* ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 778 P. 2d 1126.

No. 89–1004. DELANEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89–1005. CARUSO ET AL. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 854, 547 N. E. 2d 92.

No. 89–1006. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 62.

No. 89–1007. OXLEY *v.* CITY OF TULSA, OKLAHOMA, BY AND THROUGH THE TULSA AIRPORT AUTHORITY. Sup. Ct. Okla. Certiorari denied. Reported below: 794 P. 2d 742.

No. 89–1009. TALAMAS *v.* UNITED STATES;
No. 89–1152. CARY *v.* UNITED STATES; and
No. 89–6352. BAUMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 546.

No. 89–1011. HELTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 549 So. 2d 589.

No. 89–1013. EAVES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 943.

No. 89–1014. MCPHERSON ET UX. *v.* BARNES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–1015. THOMAS *v.* OHIO. Ct. App. Ohio, Washington County. Certiorari denied.

No. 89–1017. NZONGOLA *v.* SUPERIOR COURT OF FULTON COUNTY, GEORGIA. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 89–1019. SOUTH CAROLINA EDUCATION ASSN. ET AL. *v.* CAMPBELL, SECRETARY OF STATE OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 1251.

No. 89–1020. MORFESIS *v.* DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 150 App. Div. 2d 181, 540 N. Y. S. 2d 711.

No. 89–1021. MORALES *v.* BURROUGHS ET AL. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xxxiii, 773 P. 2d 692.

No. 89–1024. SICKELSMITH *v.* TOOLIS. Ct. App. Ohio, Columbiana County. Certiorari denied.

No. 89–1025. ENGLAND, INDIVIDUALLY AND DBA VIDEO AMERICA, ET AL. *v.* HENDRICKS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 880 F. 2d 281.

No. 89–1026. INDIANA COAL COUNCIL, INC., ET AL. *v.* INDIANA DEPARTMENT OF NATURAL RESOURCES ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 542 N. E. 2d 1000.

No. 89–1029. STATE BOARD OF EQUALIZATION AND ASSESSMENT *v.* NORTHERN NATURAL GAS CO. ET AL.; and STATE BOARD OF EQUALIZATION AND ASSESSMENT *v.* TRAILBLAZER PIPELINE CO. ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 232 Neb. 806, 443 N. W. 2d 249 (first case); 232 Neb. 823, 442 N. W. 2d 386 (second case).

No. 89–1032. ALLEN ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 420.

No. 89–1034. GOLDSTEIN *v.* DELTA AIR LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1440.

No. 89–1036. DEADWYLER ET AL. *v.* VOLKSWAGEN OF AMERICA, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 779.

No. 89–1038. CARBONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 880 F. 2d 1500.

No. 89–1039. DALTON ET VIR *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 234 N. J. Super. 128, 560 A. 2d 683.

No. 89–1042. NEWMAN *v.* BURGIN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 884 F. 2d 19.

No. 89–1045. HEALTHMASTER, INC., ET AL. *v.* CHATTAHOOCHEE VALLEY HOME HEALTH CARE, INC. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 387, 385 S. E. 2d 290.

No. 89–1047. BOGGERTY ET UX. *v.* WILSON ET AL. Ct. App. Mich. Certiorari denied. Reported below: 160 Mich. App. 514, 408 N. W. 2d 809.

No. 89–1050. DADE COUNTY ET AL. *v.* LAKE LUCERNE CIVIC ASSN., INC., ET AL.; and

No. 89–1062. LAKE LUCERNE CIVIC ASSN., INC., ET AL. *v.* DOLPHIN STADIUM CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1360.

No. 89–1051. POWELL ET AL. *v.* WESTERN ILLINOIS ELECTRIC COOPERATIVE ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 180 Ill. App. 3d 581, 536 N. E. 2d 231.

No. 89–1053. CAMOSCIO *v.* BOARD OF REGISTRATION IN PODIATRY. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 853.

No. 89–1054. BITUMINOUS CASUALTY CORP. *v.* CORPORATION OF THE PRESIDING BISHOP OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 938.

No. 89–1055. NORFOLK SHIPBUILDING & DRYDOCK CORP. *v.* LATHEY. Ct. App. Va. Certiorari denied. Reported below: 8 Va. App. 306, 380 S. E. 2d 665.

No. 89–1057. J & N VIDEO, INC. *v.* KENTUCKY. Cir. Ct. Ky., Campbell County. Certiorari denied.

No. 89–1059. PAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1317.

No. 89–1061. SEVENTH-DAY ADVENTIST CONGREGATIONAL CHURCH ET AL. *v.* GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 228.

No. 89–1065. CAMOSCIO *v.* MURPHY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 887 F. 2d 259.

No. 89–1066. ALLOCATI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1069. CLELAND ET UX. *v.* GRAYBAR ELECTRIC CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 260.

No. 89–1070. TERRY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–1071. LYNCH *v.* BELDEN & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 882 F. 2d 262.

No. 89–1072. LATSHAW *v.* PENNSYLVANIA ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 389 Pa. Super. 648, 560 A. 2d 826.

No. 89–1077. AL-PAR, INC. *v.* BAIRD & WARNER, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 183 Ill. App. 3d 467, 539 N. E. 2d 192.

No. 89–1083. J. I. HASS CO., INC. *v.* GILBANE BUILDING CO. C. A. 3d Cir. Certiorari denied. Reported below: 881 F. 2d 89.

No. 89–1092. HIGGINS *v.* MAHER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 210 Cal. App. 3d 1168, 258 Cal. Rptr. 757.

No. 89–1093. BRIGGS *v.* SLETTEN, EXECUTIVE DIRECTOR, NORTH DAKOTA BOARD OF MEDICAL EXAMINERS, ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 448 N. W. 2d 607.

No. 89–1095. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1398.

No. 89–1099. ARIZONA EX REL. DEAN, TUCSON CITY ATTORNEY *v.* CITY COURT OF CITY OF TUCSON ET AL. (HARING ET AL., REAL PARTIES IN INTEREST). Sup. Ct. Ariz. Certiorari denied. Reported below: 161 Ariz. 297, 778 P. 2d 1193.

No. 89–1102. GATTO ET AL. *v.* MERIDIAN MEDICAL ASSOCIATES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 840.

No. 89–1107. SCHWAB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 509.

No. 89–1127. AUSTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1089.

No. 89–1129. HERTZKE ET UX., INDIVIDUALLY AND AS PARENTS OF HERTZKE, A MINOR *v.* REILEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 281.

No. 89–1132. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 492.

No. 89–1133. VISLISEL *v.* UNIVERSITY OF IOWA ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 445 N. W. 2d 771.

No. 89–1147. BIBACE *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 89–1151. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 1575.

No. 89–1157. LYNCH, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF EVANS, ET AL. *v.* FLEMING, GUARDIAN AD LITEM FOR FLEMING. Sup. Ct. S. C. Certiorari denied. Reported below: 299 S. C. 366, 384 S. E. 2d 748.

No. 89–1163. VESEY *v.* MACY'S HERALD SQUARE. Civ. Ct., City of New York, N. Y. Certiorari denied.

No. 89–1168. KIEFER, EXECUTOR, ESTATE OF BOGRAD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1084.

No. 89–1178. CASAMENTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 1141.

No. 89–1195. ST. JOSEPH HOSPITAL *v.* CELOTEX CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 764.

No. 89–5712. BRITO-MEJIA *v.* UNITED STATES; and
No. 89–5734. CARRASCO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 945.

No. 89–5742. JERRY EL *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 856.

No. 89–5767. HARMON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 775 S. W. 2d 583.

No. 89–5792. TUTINO *v.* UNITED STATES; and

No. 89–5878. GUARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 883 F. 2d 1125.

No. 89–5853. LAMB *v.* SOWDERS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 1321.

No. 89–5877. BROWN *v.* LABORERS' INTERNATIONAL UNION OF NORTH AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 877 F. 2d 62.

No. 89–5909. DOTTS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 878 F. 2d 1444.

No. 89–5937. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 454.

No. 89–5947. WILLIAMS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 1376.

No. 89–5948. SPAULDING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1386.

No. 89–5949. MANG SUN WONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 1537.

No. 89–5952. LAUBACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 869 F. 2d 965 and 884 F. 2d 924.

No. 89–5959. WILLIAMSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 89–5963. PANZARDI-ALVAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 879 F. 2d 975.

No. 89–5971. GOSSETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 901.

No. 89–6011. THARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1393.

No. 89–6013. PARKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 881 F. 2d 945.

No. 89–6017. RENEER *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 75.

No. 89-6024. MCAFEE *v.* FIFTH CIRCUIT JUDGES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 221.

No. 89-6028. DEBUSK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 878.

No. 89-6030. CREEKMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 878.

No. 89-6035. HOCHBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89-6053. HORTON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 151 Wis. 2d 250, 445 N. W. 2d 46.

No. 89-6054. FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 875.

No. 89-6056. HENSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 563 A. 2d 1096.

No. 89-6070. OWENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89-6073. BRADY *v.* PONTE. C. A. 1st Cir. Certiorari denied.

No. 89-6076. GHAFOOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 872 F. 2d 414.

No. 89-6080. HOFLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 1033.

No. 89-6085. MARSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1035.

No. 89-6099. TORTORICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 878 F. 2d 387.

No. 89-6104. WALDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 890 F. 2d 1165.

No. 89-6105. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 89-6114. FONTANEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1091.

No. 89–6119. RODRIGUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 882 F. 2d 1059.

No. 89–6137. RUSCOE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 212 Conn. 223, 563 A. 2d 267.

No. 89–6139. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 886 F. 2d 81.

No. 89–6152. CHAVEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6154. BIG EAGLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 539.

No. 89–6158. TINSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1392.

No. 89–6160. NASH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 2d 1359.

No. 89–6169. BALLARD *v.* VOLUNTEERS OF AMERICA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 93.

No. 89–6185. IGNATIUS *v.* IMMIGRATION AND NATURALIZATION SERVICE; and IN RE IGNATIUS. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 272 (first case).

No. 89–6187. SPINKS *v.* DIXON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 866.

No. 89–6198. GARZA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89–6200. CHAPEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–6206. WRIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89–6207. EIERLE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 547 So. 2d 646.

No. 89–6208. EIERLE *v.* LAMBDIN, SUPERINTENDENT, GLADES CORRECTIONAL INSTITUTE, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89-6211. KURBEGOVICH *v.* VASQUEZ. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89-6212. LEPISCOPO *v.* HOPWOOD ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6216. NORTHCOTT *v.* LOVE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-6218. SANDERS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 89-6221. RANDOLPH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 179 Ill. App. 3d 1105, 551 N. E. 2d 1131.

No. 89-6222. GIBBONS, NKA RACZKOWSKI *v.* L. W. BLAKE MEMORIAL HOSPITAL ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 538 So. 2d 1386.

No. 89-6227. SEITU ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 89-6231. GREEN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89-6232. HOWELL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 89-6240. MCGHEE *v.* CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 897.

No. 89-6246. TASBY, AKA AMEN-RA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89-6247. WOOL *v.* FEFEL ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 79 Md. App. 777.

No. 89-6248. BYNUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89-6251. GIBSON *v.* COHN, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 89-6255. POLING ET AL. *v.* CALDWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89-6256. ABNER *v.* ESCAMBIA COUNTY SCHOOL DISTRICT, PENSACOLA, FLORIDA (two cases). C. A. 11th Cir. Certiorari denied.

No. 89-6258. EWING *v.* DAVIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1383.

No. 89-6259. CLAYTON *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1085.

No. 89-6261. LAWSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89-6262. MITCHELL *v.* TOWSON STATE UNIVERSITY. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1080.

No. 89-6265. WILLIAMSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89-6267. CHANDLER *v.* MOORE ET AL. C. A. 8th Cir. Certiorari denied.

No. 89-6268. BUCCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 884 F. 2d 1483.

No. 89-6270. CALPIN *v.* EISTER. C. A. 3d Cir. Certiorari denied.

No. 89-6272. LAIRD *v.* LACK, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 912.

No. 89-6273. GOFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 57.

No. 89-6275. D'AMARIO *v.* CITY OF PROVIDENCE ET AL. Sup. Ct. R. I. Certiorari denied.

No. 89-6276. APPLEBY *v.* YOUNG, COMMISSIONER, SOCIAL AND REHABILITATION SERVICES OF VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 152 Vt. 415, 566 A. 2d 1310.

No. 89-6277. APPLEBY *v.* YOUNG, COMMISSIONER, SOCIAL AND REHABILITATION SERVICES OF VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 152 Vt. 487, 567 A. 2d 1139.

No. 89-6278. DEMOS *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. C. A. 9th Cir. Certiorari denied.

No. 89-6280. STIDUM *v.* TRICKEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 582.

No. 89-6281. MCNEILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 448.

No. 89-6283. KENROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1389.

No. 89-6286. SHAKUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 234.

No. 89-6288. RANDALL ET AL. *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 432 Mich. 905, 444 N. W. 2d 522.

No. 89-6291. SALERNO *v.* BRANSTAD ET AL. C. A. 8th Cir. Certiorari denied.

No. 89-6294. KINNEAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1313.

No. 89-6295. MECKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1387.

No. 89-6297. CARRALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1389.

No. 89-6299. BROWN *v.* MASONRY PRODUCTS, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 1476.

No. 89-6301. BOOTH *v.* K MART CORP. ET AL. C. A. 5th Cir. Certiorari denied.

No. 89-6304. QUINTANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89-6306. WHITAKER *v.* NEW TREAD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89-6307. GROWNEY *v.* MEYERS ET AL. Ct. App. Mich. Certiorari denied.

No. 89-6309. FERDIK *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 89-6310. IGLESIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 1519.

No. 89-6314. PICKETT *v.* GAITHER, SUPERINTENDENT, COASTAL CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 420.

No. 89-6315. BECKER *v.* ILLINOIS REAL ESTATE ADMINISTRATION AND DISCIPLINARY BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 955.

No. 89-6318. HAYES *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1451.

No. 89-6319. ANGULO FARRUFIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 272.

No. 89-6320. LOSACCO *v.* UNITED STATES FIDELITY & GUARANTY CO. App. Ct. Conn. Certiorari denied. Reported below: 19 Conn. App. 806, 563 A. 2d 1386.

No. 89-6323. TURNER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6325. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1392.

No. 89-6326. KILCREASE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1073.

No. 89-6328. HUFFMAN *v.* YOUNGSTOWN STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 871.

No. 89-6329. BROWN *v.* FREY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 159.

No. 89-6334. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 1318.

No. 89-6335. D'AMARIO *v.* PROVIDENCE CIVIC CENTER AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1326.

No. 89-6336. HOPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 906.

No. 89-6337. CONNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 984.

No. 89-6339. GUTIERREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89-6340. D'AMARIO *v.* RHODE ISLAND. Super. Ct. Providence & Bristol Counties, R. I. Certiorari denied.

No. 89-6341. BLAKE *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-6343. SIMS *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89-6344. VISSER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 89-6346. SHABAZZ, AKA PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89-6348. MITCHELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 1313.

No. 89-6349. WILLIAMSON *v.* A. G. EDWARDS & SONS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 2d 69.

No. 89-6350. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89-6353. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6354. REDDING *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 575.

No. 89-6355. SAUVEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1387.

No. 89-6356. SOLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89-6358. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 89-6361. SPYCHALA *v.* CAMPOY. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 130.

No. 89-6365. GUILES *v.* NOWLAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 1321.

No. 89-6366. WEBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 568.

No. 89-6368. HUNTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1001.

No. 89-6369. WARREN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89-6372. ANDERSON *v.* GREEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1394.

No. 89-6374. LLERA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 855 F. 2d 357.

No. 89-6379. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 1312.

No. 89-6380. CHAKA *v.* KLINCAR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 332.

No. 89-6381. CURRY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 89-6382. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89-6384. SCIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 89-6387. HEREDIA *v.* STICKRATH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 579.

No. 89-6388. HARRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6389. SWEETING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 89-6399. TANNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1392.

No. 89-6400. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 905.

No. 89-6403. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6406. CEBALLOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89-6407. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 868.

No. 89-6410. RAMIREZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89-6412. GARCIA-MOLINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 1162.

No. 89-6413. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 87.

No. 89-6422. BARNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-6423. PIRES *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 866.

No. 89-6442. DAVIS ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 887 F. 2d 1095.

No. 89-6443. CALLOWAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 274.

No. 89-6445. SAUNDERS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 565 A. 2d 996.

No. 89-6448. QUIGLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 1019.

No. 89-6453. PRINCE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6460. BREWER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 559 A. 2d 317.

No. 89-6465. CASSELL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 178.

No. 89-6473. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89-6474. BISHOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 212.

No. 89-6475. PERLAZA-MOSQUERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 347.

No. 89-6478. CASTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 562.

No. 89-6480. SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 344.

No. 89-6481. COLLIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6483. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 890 F. 2d 1373.

No. 89-6485. DEQUIERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 347.

No. 89-6487. PRESSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 88.

No. 89-6490. GORDON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 184 Ill. App. 3d 1105, 562 N. E. 2d 408.

No. 89-6497. BLOCH ET AL. *v.* PILGRIM PSYCHIATRIC CENTER. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 789, 551 N. E. 2d 591.

No. 89-6524. SCHULTZ *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 152 Wis. 2d 408, 448 N. W. 2d 424.

No. 88–5811. HARDCASTLE *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 88–6272. WILSON *v.* ZANT, DEPUTY COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Ga.;
No. 88–7299. PRUITT *v.* GEORGIA. Sup. Ct. Ga.;
No. 89–5223. MACK *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–6166. TOMPKINS *v.* FLORIDA. Sup. Ct. Fla.;
No. 89–6192. MURRAY *v.* MISSOURI. Sup. Ct. Mo.;
No. 89–6427. SPENCER *v.* VIRGINIA. Sup. Ct. Va.; and
No. 89–6435. SPENCER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 88–5811, 519 Pa. 236, 546 A. 2d 1101; No. 88–7299, 258 Ga. 583, 373 S. E. 2d 192; No. 89–5223, 128 Ill. 2d 231, 538 N. E. 2d 1107; No. 89–6166, 549 So. 2d 1370; No. 89–6192, 775 S. W. 2d 89; No. 89–6427, 238 Va. 295, 384 S. E. 2d 785; No. 89–6435, 238 Va. 563, 385 S. E. 2d 850.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–324. P*I*E NATIONWIDE, INC. *v.* PERRY ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 872 F. 2d 157.

No. 89–939. HEALTHAMERICA ET AL. *v.* MENTON. Sup. Ct. Ala. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 551 So. 2d 235.

No. 89–701. TUOLUMNE PARK AND RECREATION DISTRICT ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 9th Cir. Motion of National Trust for Historic Preservation in the United States et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 881 F. 2d 663.

No. 89–775. GASTON COUNTY BOARD OF EDUCATION ET AL. *v.* SHOOK, BY AND THROUGH HER GUARDIAN AD LITEM, SHOOK. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 882 F. 2d 119.

No. 89–889. LUBMAN ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE CITY. Ct. App. Md. Certiorari denied. JUSTICE

WHITE would grant certiorari. Reported below: 317 Md. 72, 562 A. 2d 720.

No. 89–1033. ESTO, INC., ET AL. *v.* CALLAHAN, DBA C. E. CALLAHAN CO. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 884 F. 2d 1180.

No. 89–5688. MACHOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 879 F. 2d 945.

No. 89–5901. FARRELL *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 887 F. 2d 258.

No. 89–798. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* HAYES. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 881 F. 2d 1451.

No. 89–1113. NEW JERSEY *v.* HOWARD. Super. Ct. N. J., App. Div. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 235 N. J. Super. 243, 561 A. 2d 1202.

No. 89–1115. SOWDERS, WARDEN *v.* CRANE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 889 F. 2d 715.

No. 89–828. FRAME ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 885 F. 2d 1119.

No. 89–869. HENRY HOLT & CO., INC. *v.* NEW ERA PUBLICATIONS INTERNATIONAL, APS. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 873 F. 2d 576.

No. 89–901. W. R. GRACE & CO.-CONN. *v.* DEPARTMENT OF REVENUE OF MONTANA ET AL. Sup. Ct. Mont. Motion of Committee on State Taxation of the Council of State Chambers of

Commerce et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 238 Mont. 439, 779 P. 2d 470.

No. 89-910. CHATHAS ET AL. *v.* SMITH, INDIVIDUALLY AND AS CHIEF OF POLICE, VILLAGE OF EVERGREEN PARK, ET AL. C. A. 7th Cir. Motion of Chicago Lawyers' Committee for Civil Rights Under Law, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 884 F. 2d 980.

No. 89-941. WESTCHESTER RADIOLOGICAL ASSOCIATES, P. C., ET AL. *v.* EMPIRE BLUE CROSS & BLUE SHIELD. C. A. 2d Cir. Motion of American College of Radiology et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 884 F. 2d 707.

No. 89-1035. CSX TRANSPORTATION, INC. *v.* CALDWELL. Sup. Ct. Va. Motion of Norfolk Southern Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 238 Va. 148, 380 S. E. 2d 910.

No. 89-1064. NEIL *v.* ESPINOZA ET AL. Ct. App. Colo. Motion of respondent Andrew Espinoza for leave to proceed *in forma pauperis* granted. Certiorari denied.

Rehearing Denied

No. 88-1474. UNITED STATES *v.* GOODYEAR TIRE & RUBBER CO. ET AL., *ante*, p. 132;

No. 88-7543. JOHNSON *v.* TEXAS, *ante*, p. 841;

No. 89-613. ENGEL *v.* CLARK COUNTY, NEVADA, *ante*, p. 993;

No. 89-5280. ALSTON *v.* DUBOIS ET AL., *ante*, p. 938;

No. 89-5802. HOLLADAY *v.* ALABAMA, *ante*, p. 1012;

No. 89-5825. QUARLES *v.* CHAMPION INTERNATIONAL CORP., *ante*, p. 1027;

No. 89-5854. FAZZINI *v.* UNITED STATES; *ante*, p. 982;

No. 89-5865. SPYCHALA *v.* BORG, WARDEN, *ante*, p. 1027;

No. 89-5899. JARRETT *v.* MINUTE MAN, INC., ET AL., *ante*, p. 1005;

No. 89-5941. WEAKLEY *v.* INDIANA, *ante*, p. 1005;

No. 89-5943. IN RE MANCHESTER, *ante*, p. 1016;

No. 89-5946. JACKSON *v.* HOROWITZ, *ante*, p. 1028;

No. 89-5966. HARTOG *v.* IOWA, *ante*, p. 1005;

No. 89-5968. LAWSE *v.* CORRY ET AL., *ante*, p. 1005;

No. 89-6009. RUBIN *v.* THRESHOLDS, INC., *ante*, p. 1031;

No. 89-6020. LAWRENCE *v.* TEXAS EMPLOYMENT COMMISSION, *ante*, p. 1031;

No. 89-6066. VISSER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (WELLS FARGO BANK, REAL PARTY IN INTEREST), *ante*, p. 1032;

No. 89-6103. GREEN *v.* MASSACHUSETTS, *ante*, p. 1033;

No. 89-6112. MAY *v.* PRO-GUARD, INC., *ante*, p. 1034; and

No. 89-6132. BRANNER *v.* FREDERICK COUNTY JAIL ET AL., *ante*, p. 1034. Petitions for rehearing denied.

RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED DECEMBER 5, 1989

EFFECTIVE JANUARY 1, 1990

The following are the Rules of the Supreme Court of the United States as revised on December 5, 1989. See *post*, p. 1098. The amended Rules became effective January 1, 1990, as provided in Rule 48, *post*, p. 1154.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, and 445 U. S. 985.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, DECEMBER 5, 1989

IT IS ORDERED that the revised Rules of this Court, today approved by the Court and lodged with the Clerk, shall become effective January 1, 1990, and be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated April 14, 1980, and appearing in Volume 445 of the United States Reports, together with all amendments thereof be, and they hereby are, rescinded as of December 31, 1989, and that the revised rules shall govern all proceedings in cases thereafter commenced and, in so far as practicable, all proceedings in cases then pending.

RULES OF THE SUPREME COURT OF THE UNITED STATES

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RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED DECEMBER 5, 1989—EFFECTIVE JANUARY 1, 1990

PART I. THE COURT

Rule 1

CLERK

.1. The Clerk shall maintain the Court's records and shall not permit any of them to be removed from the Court building except as authorized by the Court. Any pleading, paper, or brief filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of the proceedings in this Court, any original records and papers transmitted to this Court by any other court will be returned to the court from which they were received.

.2. The office of the Clerk will be open, except on a federal legal holiday, from 9 a.m. to 5 p.m., Monday through Friday, unless otherwise ordered by the Court or the Chief Justice. See 5 U. S. C. § 6103 for a list of federal legal holidays.

Rule 2

LIBRARY

.1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States, its departments and agencies.

.2. The library will be open during such times as the reasonable needs of the Bar may require. Its operation shall be governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

.3. Library books may not be removed from the building, except by a Justice or a member of a Justice's legal staff.

Rule 3

TERM

.1. The Court will hold a continuous annual Term commencing on the first Monday in October. See 28 U. S. C. § 2. At the end of each Term, all cases pending on the docket will be continued to the next Term.

.2. The Court at every Term will announce the date after which no case will be called for oral argument at that Term unless otherwise ordered.

Rule 4

SESSIONS AND QUORUM

.1. Open sessions of the Court will be held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless otherwise ordered, the Court will sit to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

.2. Any six Members of the Court constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending, or if no Justice is present, the Clerk or a Deputy Clerk may announce that the Court will not meet until there is a quorum.

.3. The Court in appropriate circumstances may direct the Clerk or the Marshal to announce recesses.

PART II. ATTORNEYS AND COUNSELORS

Rule 5

ADMISSION TO THE BAR

.1. It shall be requisite for admission to the Bar of this Court that the applicant shall have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or of the District of Columbia for the three years

immediately preceding the date of application and shall have been free from any adverse disciplinary action whatsoever during that 3-year period, and that the applicant appears to the Court to be of good moral and professional character.

.2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and who must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

.3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, has signed the oath or affirmation, and has paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so desires may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

.4. Each applicant shall take or subscribe to the following oath or affirmation:

I, ... , do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

.5. The fee for admission to the Bar and a certificate under seal is $100, payable to the Marshal, U. S. Supreme Court. The Marshal shall maintain the proceeds as a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and the Supreme Court Bar, and for related purposes.

.6. The cost for a duplicate certificate of admission to the Bar under seal is $10, payable to the Marshal, U. S. Supreme Court. The proceeds shall be maintained by the Marshal as provided in paragraph .5 of this Rule.

Rule 6

Argument Pro Hac Vice

.1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or of the District of Columbia for the requisite three years, but who is otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice*.

.2. An attorney, barrister, or advocate who is qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*.

.3. Oral argument *pro hac vice* will be allowed only on motion of the attorney of record for the party on whose behalf leave is requested. The motion must briefly and distinctly state the appropriate qualifications of the attorney who is to argue *pro hac vice*. It must be filed with the Clerk, in the form prescribed by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed and must be accompanied by proof of service pursuant to Rule 29.

Rule 7

Prohibition Against Practice

.1. The Clerk shall not practice as an attorney or counselor while holding office.

.2. No law clerk, secretary to a Justice, or other employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed at the Court; nor shall any person after leaving employment in this Court participate, by way of any form of professional consultation or assistance, in any case pending before this Court or in any case being considered for filing in this Court,

until two years have elapsed after separation; nor shall a former employee ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the employee's tenure.

Rule 8

Disbarment and Disciplinary Action

.1. Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, that member will be suspended from practice before this Court forthwith and will be afforded the opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

.2. The Court may, after reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule of the Court.

Rule 9

Appearance of Counsel

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party repre-

sented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

Rule 11

CERTIORARI TO A UNITED STATES COURT OF APPEALS BEFORE JUDGMENT

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U. S. C. §2101(e).

Rule 12

REVIEW ON CERTIORARI; HOW SOUGHT; PARTIES

.1. The petitioner's counsel, who must be a member of the Bar of this Court, shall file, with proof of service as provided by Rule 29, 40 copies of a printed petition for a writ of certiorari, which shall comply in all respects with Rule 14, and shall pay the docket fee prescribed by Rule 38. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. The notice shall be served as required by Rule 29.

.2. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party who is not shown on the petition for a writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition. When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a writ of certiorari shall not be joined with any other pleading.

.3. Not more than 30 days after receipt of the petition for a writ of certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall file, with proof of service as prescribed by Rule 29, 40 printed copies of a cross-petition for a writ of certiorari, which shall

comply in all respects with Rule 14, except that materials printed in the appendix to the original petition need not be reprinted, and shall pay the docket fee pursuant to Rule 38. The cover of the petition shall clearly indicate that it is a cross-petition. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 13.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent, on a form supplied by the Clerk, of the date of docketing and of the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, and the Clerk shall not accept any pleading so joined. The time for filing a cross-petition may not be extended.

.4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that a response to the petition shall be filed within 20 days after its receipt, and the time may not be extended.

.5. The clerk of the court having possession of the record shall retain custody thereof pending notification from the Clerk of this Court that the record is to be certified and transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each docu-

ment transmitted. If the record, or stipulated portions thereof, has been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The record may consist of certified copies, but the presiding judge of the lower court who believes that original papers of any kind should be seen by this Court may, by order, make provision for their transport, safekeeping, and return.

Rule 13

Review on Certiorari; Time for Petitioning

.1. A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort, a United States court of appeals, or the United States Court of Military Appeals shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the Clerk within 90 days after the entry of the order denying discretionary review.

.2. A Justice of this Court, for good cause shown, may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days.

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry

of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

.5. A cross-petition for a writ of certiorari shall be deemed in time when it is filed with the Clerk as provided in paragraphs .1, .2, and .4 of this Rule, or in Rule 12.3. However, a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

.6. An application to extend the time to file a petition for a writ of certiorari must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion and any order respecting rehearing, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a petition for a writ of certiorari is not favored.

Rule 14

Content of the Petition for a Writ of Certiorari

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the

names of all parties appear in the caption of the case. This listing may be done in a footnote. See also Rule 29.1 for the required listing of parent companies and nonwholly owned subsidiaries.

(c) A table of contents and a table of authorities, if the petition exceeds five pages.

(d) A reference to the official and unofficial reports of opinions delivered in the case by other courts or administrative agencies.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the entry of the judgment or decree sought to be reviewed;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari;

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

(i) If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

(k) An appendix containing, in the following order:

(i) The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each document shall include the caption showing

the name of the issuing court or agency, the title and number of the case, and the date of entry.

(iii) Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

(iv) The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph.

(v) Any other appended materials.

If what is required by subparagraphs .1(f), (h), and (k) of this Rule to be included in or filed with the petition is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

.2. The petition for a writ of certiorari and the appendix thereto, whether in the same or a separate volume, shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for a writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39.

.3. All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for a writ of certiorari shall be as short as possible and may not exceed the page limitations set out in Rule 33.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Rule 15

BRIEF IN OPPOSITION; REPLY BRIEF; SUPPLEMENTAL BRIEF

.1. A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

.2. The respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 30.4) after receipt of a petition within which to file 40 printed copies of an opposing brief disclosing any matter or ground as to why the case should not be reviewed by this Court. See Rule 10. The brief in opposition shall comply with Rule 33 and with the requirements of Rule 24 governing a respondent's brief, and shall be served as prescribed by Rule 29. A brief in opposition shall not be joined with any other pleading. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. If the petitioner is proceeding *in forma pauperis*, the respondent may file 12 typewritten copies of a brief in opposition prepared in the manner prescribed by Rule 34.

.3. A brief in opposition shall be as short as possible and may not exceed the page limitations set out in Rule 33.

.4. No motion by a respondent to dismiss a petition for a writ of certiorari will be received. Objections to the jurisdiction of the Court to grant a writ of certiorari may be included in the brief in opposition.

.5. Upon the filing of a brief in opposition, the expiration of the time allowed therefor, or an express waiver of the right to file, the petition and brief in opposition, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for a writ of certiorari has been filed, distribution of both it and the petition for a writ of certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, the expiration of the time allowed therefor, or an express waiver of the right to file.

.6. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing. Forty copies of the reply brief, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

.7. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief must be restricted to new matter. Forty copies of the supplemental brief, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

Rule 16

Disposition of a Petition for a Writ of Certiorari

.1. After consideration of the papers distributed pursuant to Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2. Whenever a petition for a writ of certiorari to review a decision of any court is granted, the Clerk shall enter an order to that effect and shall forthwith notify the court below and counsel of record. The case will then be scheduled for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of

the court having possession of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3. Whenever a petition for a writ of certiorari to review a decision of any court is denied, the Clerk shall enter an order to that effect and shall forthwith notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

PART IV. OTHER JURISDICTION

Rule 17

Procedure in an Original Action

.1. This Rule applies only to an action within the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and the Eleventh Amendment to the Constitution of the United States. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction must be filed in accordance with Rule 20.

.2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure should be followed in an original action to be filed in this Court. In other respects those Rules, when their application is appropriate, may be taken as a guide to procedure in an original action in this Court.

.3. The initial pleading in any original action shall be prefaced by a motion for leave to file, and both the pleading and motion must be printed in conformity with Rule 33. A brief in support of the motion for leave to file, which shall also comply with Rule 33, may also be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 29, are required, except that when an adverse party is a State, service shall be made on both the Governor and the attorney general of that State.

.4. The case will be placed on the docket when the motion for leave to file and the pleading are filed with the Clerk.

The docket fee provided by Rule 38 must be paid at that time.

.5. Within 60 days after the receipt of the motion for leave to file and the pleading, an adverse party may file, with proof of service as prescribed by Rule 29, 60 printed copies of a brief in opposition to the motion. The brief shall comply with Rule 33. When the brief in opposition has been filed, or when the time within which it may be filed has expired, the motion, pleading, and briefs will be distributed to the Court by the Clerk. The Court may thereafter grant or deny the motion, set it down for oral argument, direct that additional pleadings be filed, or require that other proceedings be conducted.

.6. A summons issuing out of this Court in an original action shall be served on the defendant 60 days before the return day set out therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

.7. Process against a State issued from the Court in an original action shall be served on both the Governor and the attorney general of that State.

Rule 18

Appeal from a United States District Court

.1. A direct appeal from a decision of a United States district court, when authorized by law, is commenced by filing a notice of appeal with the clerk of the district court within 30 days after the entry of the judgment sought to be reviewed. The time may not be extended. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment, or part thereof, appealed from and the date of its entry, and shall specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding pursuant to Rule 29 and proof of service must be filed in the district court with the notice of appeal.

.2. All parties to the proceeding in the district court shall be deemed parties to the appeal, but a party having no interest in the outcome of the appeal may so notify the Clerk of

this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately; or any two or more may join in an appeal.

.3. Not more than 60 days after the filing of the notice of appeal in the district court, counsel for the appellant shall file, with proof of service as prescribed by Rule 29, 40 printed copies of a statement as to jurisdiction and pay the docket fee prescribed by Rule 38. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14. The appendix must also include a copy of the notice of appeal showing the date it was filed in the district court. The jurisdictional statement and the appendices thereto must be produced in conformity with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner prescribed in Rule 39. A Justice of this Court may, for good cause shown, extend the time for filing a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement must set out the basis of jurisdiction in this Court, must identify the judgment to be reviewed, must include a copy of the opinion, any order respecting rehearing, and the notice of appeal, and must set forth specific reasons why the granting of an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

.4. The clerk of the district court shall retain possession of the record pending notification from the Clerk of this Court that the record is to be certified and transmitted. See Rule 12.5.

.5. After a notice of appeal has been filed, but before the case is docketed in this Court, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal upon motion of the appellant and notice to all parties. If a notice of appeal has been filed, but the case has not been docketed in this Court within the time prescribed for docketing or any enlargement thereof,

the district court may dismiss the appeal upon the motion of the appellee and notice to all parties and may make any order with respect to costs as may be just. If an appellee's motion to dismiss the appeal is not granted, the appellee may have the case docketed in this Court and may seek to have the appeal dismissed by filing a motion pursuant to Rule 21. If the appeal is dismissed, the Court may give judgment for costs against the appellant.

.6. Within 30 days after receipt of the jurisdictional statement, the appellee may file 40 printed copies of a motion to dismiss, to affirm, or, in the alternative, to affirm and dismiss. The motion shall comply in all respects with Rules 21 and 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. The Court may permit the appellee to defend a judgment on any ground that the law and record permit and that would not expand the relief granted.

.7. Upon the filing of the motion, or the expiration of the time allowed therefor, or an express waiver of the right to file, the jurisdictional statement and motion, if any, will be distributed by the Clerk to the Court for its consideration.

.8. A brief opposing a motion to dismiss or affirm may be filed by an appellant, but distribution to the Court under paragraph .7 of this Rule will not be delayed pending its receipt. Forty copies, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

.9. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. Forty copies, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

.10. After consideration of the papers distributed under this Rule, the Court may summarily dispose of the appeal on the merits, note probable jurisdiction, or postpone jurisdiction to the hearing on the merits. If not disposed of summarily, the case will stand for briefing and oral argument on the merits. If consideration of jurisdiction is postponed,

counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction.

Rule 19

Procedure on a Certified Question

.1. A United States court of appeals may certify to this Court a question or proposition of law concerning which it desires instruction for the proper decision of a case. The certificate submitted shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they must be distinct and definite.

.2. When a case is certified by a United States court of appeals, this Court, on application or on its own motion, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

.3. When a case is certified, the Clerk will notify the respective parties and docket the case. Counsel shall then enter their appearances. After docketing, the certificate shall be submitted to the Court for a preliminary examination to determine whether the case shall be briefed, set for argument, or dismissed. No brief may be filed prior to the preliminary examination of the certificate.

.4. If the Court orders that the case be briefed or set for argument, the parties shall be notified and permitted to file briefs. The Clerk of this Court shall then request the clerk of the court from which the case originates to certify the record and transmit it to this Court. Any portion of the record to which the parties wish to direct the Court's particular attention shall be printed in a joint appendix prepared by the appellant in the court below under the procedures provided in Rule 26, but the fact that any part of the record has not been printed shall not prevent the parties or the Court from relying on it.

.5. A brief on the merits in a case on certificate shall comply with Rules 24, 25, and 33, except that the brief of the party who is the appellant below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Rule 20

PROCEDURE ON A PETITION FOR AN EXTRAORDINARY WRIT

.1. The issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

.2. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U. S. C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 printed copies, with proof of service as prescribed by Rule 29 (subject to subparagraph .4(b) of this Rule), are filed with the Clerk and the docket fee is paid.

.3. (a) A petition seeking the issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, shall set forth the name and office or function of every person against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to the petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and any other paper essential to an understanding of the petition.

(b) The petition shall be served on the judge or judges to whom the writ is sought to be directed and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges and the other

parties may, within 30 days after receipt of the petition, file 40 printed copies of a brief or briefs in opposition thereto, which shall comply fully with Rule 15. If the judge or judges who are named respondents do not desire to respond to the petition, they may so advise the Clerk and all parties by letter. All persons served shall be deemed respondents for all purposes in the proceedings in this Court.

.4. (a) A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

(b) Proceedings under this paragraph .4 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

.5. When a brief in opposition under subparagraph .3(b) has been filed, when a response under subparagraph .4(b) has been ordered and filed, when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the case to be set for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for a common law writ of certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 26.

PART V. MOTIONS AND APPLICATIONS

Rule 21

MOTIONS TO THE COURT

.1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and (except for a motion to dismiss or affirm under Rule 18) may present legal argument in support thereof. No separate brief may be filed. A motion shall be as short as possible and shall comply with any applicable page limits. For an application addressed to a single Justice, see Rule 22.

.2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss or affirm under Rule 18, a motion to dismiss as moot (or a suggestion of mootness), a motion for permission to file a brief *amicus curiae*, and any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be printed in accordance with Rule 33 and shall comply with all other requirements of that Rule. Forty copies of the motion shall be filed.

(c) Any other motion to the Court may be typewritten in accordance with Rule 34, but the Court may subsequently require the motion to be printed by the moving party in the manner provided by Rule 33.

.3. A motion to the Court shall be filed with the Clerk and must be accompanied by proof of service as provided by Rule 29. No motion shall be presented in open court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument will not be permitted on any motion unless the Court so directs.

.4. A response to a motion shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within 10 days of receipt, unless otherwise ordered by the Court or a Justice or by the Clerk under the provisions of Rule 30.4. A response to a printed motion shall be printed if time permits. In an appropriate case, however, the Court may act on a motion without waiting for a response.

Rule 22

Applications to Individual Justices

.1. An application addressed to an individual Justice shall be submitted to the Clerk, who will promptly transmit it to the Justice concerned.

.2. The original and two copies of any application addressed to an individual Justice shall be filed in the form prescribed by Rule 34, and shall be accompanied by proof of service on all parties.

.3. The Clerk in due course will advise all counsel concerned, by means as speedy as may be appropriate, of the disposition made of the application.

.4. The application shall be addressed to the Justice allotted to the Circuit within which the case arises. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

.5. A Justice denying the application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is out of time under Rule 30.2, the party making the application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial has been without prejudice, a renewed application is not favored. Any renewed application may be made by sending a letter to the Clerk of the Court addressed

to another Justice to which must be attached 12 copies of the original application, together with proof of service pursuant to Rule 29.

.6. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

Rule 23

STAYS

.1. A stay may be granted by a Justice of this Court as permitted by law.

.2. A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on writ of certiorari. 28 U. S. C. § 2101(f).

.3. An application for a stay must set forth with particularity why the relief sought is not available from any other court or judge thereof. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested has first been sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay is deemed justified. The form and content of an application for a stay are governed by Rule 22.

.4. The judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond shall be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

PART VI. BRIEFS ON THE MERITS AND ORAL ARGUMENT

Rule 24

Brief on the Merits; In General

.1. A brief of a petitioner or an appellant on the merits must comply in all respects with Rule 33, and must contain in the order here indicated:

(a) The questions presented for review, stated as required by Rule 14. The phrasing of the questions presented need not be identical with that set forth in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote. See also Rule 29.1, which requires a list of parent companies and nonwholly owned subsidiaries.

(c) A table of contents and a table of authorities, if the brief exceeds five pages.

(d) Citations of the opinions and judgments delivered in the courts below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citation of the statutory provision and of the time factors upon which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their

pertinent text, if not already set forth in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set forth in an appendix to the brief.

(g) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.* (J. A. 12) or to the record, *e. g.* (R. 12).

(h) A summary of the argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. A mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law being presented and citing the authorities and statutes relied upon.

(j) A conclusion, specifying with particularity the relief which the party seeks.

.2. The brief filed by a respondent or an appellee must conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side. Items required by subparagraphs .1(a), (b), (d), (e), and (f) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the other side.

.3. A brief on the merits shall be as short as possible and shall not exceed the page limitations set out in Rule 33. An appendix to a brief must be limited to relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

.4. A reply brief shall conform to those portions of this Rule that are applicable to the brief of a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

.5. A reference to the joint appendix or to the record set forth in any brief must be accompanied by the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge must be indicated, *e. g.* (Pl. Ex. 14; R. 199, 2134).

.6. A brief must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. A brief not complying with this paragraph may be disregarded and stricken by the Court.

Rule 25

Brief on the Merits; Time for Filing

.1. Counsel for the petitioner or appellant shall file with the Clerk 40 copies of a brief on the merits within 45 days of the order granting the writ of certiorari or of the order noting or postponing probable jurisdiction.

.2. Forty copies of the brief of the respondent or appellee must be filed with the Clerk within 30 days after the receipt of the brief filed by the petitioner or appellant.

.3. A reply brief, if any, must be filed within 30 days after receipt of the brief for the respondent or appellee, or must actually be received by the Clerk not later than one week before the date of oral argument, whichever is earlier. Forty copies are required.

.4. The periods of time stated in paragraphs .1 and .2 of this Rule may be enlarged as provided in Rule 30. If a case is advanced for hearing, the time for filing briefs on the merits may be abridged as circumstances require pursuant to the order of the Court on its own motion or a party's application.

.5. A party desiring to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to have been included in a brief may file 40 printed copies of a supplemental brief, restricted to new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument, or by leave of the Court thereafter.

.6. No brief will be received through the Clerk or otherwise after a case has been argued or submitted, except from a party and upon leave of the Court.

.7. No brief will be received by the Clerk unless it is accompanied by proof of service as required by Rule 29.

Rule 26

THE JOINT APPENDIX

.1. Unless the parties agree to use the deferred method allowed in paragraph .4 of this Rule, or the Court so directs, the petitioner or appellant, within 45 days after the entry of the order granting the writ of certiorari, or noting or postponing jurisdiction, shall file 40 copies of a joint appendix, printed as prescribed by Rule 33. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleading, jury instruction, finding, conclusion, or opinion; (3) the judgment, order, or decision sought to be reviewed; and (4) any other parts of the record which the parties particularly wish to bring to the Court's attention. Any of the foregoing items which have already been reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing complying with Rule 33 need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding.

.2. The parties are encouraged to agree to the contents of the joint appendix. In the absence of agreement, the petitioner or appellant shall, not later than 10 days after receipt of the order granting the writ of certiorari, or noting or postponing jurisdiction, serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. A respondent or appellee who deems the parts of the record so designated not to be sufficient shall, within 10 days after receipt of the designation, serve upon the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appel-

lant shall include the parts so designated. If the respondent or appellee has been permitted by this Court to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record deemed unnecessary.

In making these designations, counsel should include only those materials the Court should examine. Unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices. Counsel may refer in their briefs and in oral argument to relevant portions of the record not included in the joint appendix.

.3. When the joint appendix is filed, the petitioner or appellant shall immediately file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties to the proceeding pursuant to Rule 29. Unless the parties otherwise agree, the cost of producing the joint appendix shall initially be paid by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix shall be taxed as costs in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose the costs thereof on that party.

.4. (a) If the parties agree, or if the Court shall so order, preparation of the joint appendix may be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix within 14 days after receipt of the brief of the respondent or appellee. The provisions of paragraphs .1, .2, and .3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served.

(b) If the deferred method is used, the briefs may make reference to the pages of the record involved. In that event,

the printed joint appendix must also include in brackets on each page thereof the page number of the record where that material may be found. A party desiring to refer directly to the pages of the joint appendix may serve and file typewritten or page-proof copies of the brief within the time required by Rule 25, with appropriate references to the pages of the record involved. In that event, within 10 days after the joint appendix is filed, copies of the brief in the form prescribed by Rule 33 containing references to the pages of the joint appendix, in place of or in addition to the initial references to the pages of the record involved, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

.5. The joint appendix must be prefaced by a table of contents showing the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the joint appendix at which each part begins. The relevant docket entries must be set out following the table of contents. Thereafter, the other parts of the record shall be set out in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement which is set out. Omissions in the transcript or in any other document printed in the joint appendix must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

.6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals shall be regarded as an exhibit for the purposes of this paragraph.

.7. The Court by order may dispense with the requirement of a joint appendix and may permit a case to be heard on the

original record (with such copies of the record, or relevant parts thereof, as the Court may require), or on the appendix used in the court below, if it conforms to the requirements of this Rule.

.8. For good cause shown, the time limits specified in this Rule may be shortened or enlarged by the Court, by a Justice thereof, or by the Clerk under the provisions of Rule 30.4.

Rule 27

The Calendar

.1. The Clerk shall from time to time prepare calendars of cases ready for argument. A case will not normally be called for argument less than two weeks after the brief of the respondent or appellee is due.

.2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

.3. On the Court's own motion, or on motion of one or more parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case or on any other terms as may be prescribed.

Rule 28

Oral Argument

.1. Oral argument should emphasize and clarify the written arguments appearing in the briefs on the merits. Counsel should assume that all Justices of the Court have read the briefs in advance of oral argument. *The Court looks with disfavor on oral argument read from a prepared text.*

.2. The petitioner or appellant is entitled to open and conclude the argument. A cross-writ of certiorari shall be argued with the initial writ of certiorari as one case in the time allowed for that one case and the Court will advise the parties who will open and close.

.3. Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the

allotted time. A request for additional time to argue must be presented by a motion to the Court under Rule 21 not later than 15 days after service of the petitioner's or appellant's brief on the merits and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

.4. Only one attorney will be heard for each side, except by special permission granted upon a request presented not later than 15 days after service of the petitioner's or appellant's brief on the merits. The request must be presented by a motion to the Court under Rule 21 and shall set forth with specificity and conciseness why more than one attorney should argue. Divided argument is not favored.

.5. In any case, and regardless of the number of counsel participating, counsel having the opening must present the case fairly and completely and not reserve points of substance for rebuttal.

.6. Oral argument will not be allowed on behalf of any party for whom no brief has been filed.

.7. By leave of the Court, and subject to paragraph .4 of this Rule, counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 37 may, with the consent of a party, argue orally on the side of that party. In the absence of consent, counsel for an *amicus curiae* may orally argue only by leave of the Court on a motion particularly setting forth why oral argument is thought to provide assistance to the Court not otherwise available. The motion will be granted only in the most extraordinary circumstances.

PART VII. PRACTICE AND PROCEDURE

Rule 29

Filing and Service of Documents; Special Notifications

.1. Any pleading, motion, notice, brief, or other document or paper required or permitted to be presented to this Court, or to a Justice, shall be filed with the Clerk. Every docu-

ment, except a joint appendix or brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of each corporation. This listing may be done in a footnote. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need to be included in the document currently being filed.

.2. To be timely filed, a document must actually be received by the Clerk within the time specified for filing; or be sent to the Clerk by first-class mail, postage prepaid, and bear a postmark showing that the document was mailed on or before the last day for filing; or, if being filed by an inmate confined in an institution, be deposited in the institution's internal mail system on or before the last day for filing and be accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, the Clerk shall require the person who mailed the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting forth the details of the mailing and stating that the mailing took place on a particular date within the permitted time. A document forwarded through a private delivery or courier service must be received by the Clerk within the time permitted for filing.

.3. Any pleading, motion, notice, brief, or other document required by these Rules to be served may be served personally or by mail on each party to the proceeding at or before the time of filing. If the document has been produced under Rule 33, three copies shall be served on each other party separately represented in the proceeding. If the document is typewritten pursuant to Rule 34, service of a single copy on each other party separately represented shall suffice. If personal service is made, it may consist of delivery at the of-

fice of counsel of record, either to counsel or to an employee therein. If service is by mail, it shall consist of depositing the document in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record at the proper post office address. When a party is not represented by counsel, service shall be made upon the party, personally or by mail.

.4. (a) If the United States or any department, office, agency, officer, or employee thereof is a party to be served, service must also be made upon the Solicitor General, Department of Justice, Washington, D. C. 20530. If a response by the Solicitor General is required or permitted within a prescribed period after service, the time does not begin to run until the document actually has been received by the Solicitor General's office. When an agency of the United States is authorized by law to appear on its own behalf as a party, or when an officer or employee of the United States is a party, the agency, officer, or employee must also be served, in addition to the Solicitor General; and if a response is required or permitted within a prescribed period, the time does not begin to run until the document actually has been received by the agency, the officer, the employee, and the Solicitor General's office.

(b) In any proceeding in this Court wherein the constitutionality of an Act of Congress is drawn in question, and the United States or any department, office, agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper filed in this Court shall recite that 28 U. S. C. § 2403(a) may be applicable, and the document must be served on the Solicitor General, Department of Justice, Washington, D. C. 20530. In a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall also state whether or not that court, pursuant to 28 U. S. C. § 2403(a), has certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn into question, and

the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper filed in this Court shall recite that 28 U. S. C. § 2403(b) may be applicable and shall be served upon the attorney general of that State. In a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall state whether or not that court, pursuant to 28 U. S. C. § 2403(b), has certified to the state attorney general the fact that the constitutionality of a statute of that State was drawn into question.

.5. Proof of service, when required by these Rules, must accompany the document when it is presented to the Clerk for filing and must be separate from it. Proof of service may be shown by any one of the methods set forth below, and must contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof.

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made.

(c) By a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court.

Rule 30

COMPUTATION AND ENLARGEMENT OF TIME

.1. In computing any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, a federal legal holiday, or a day on which the Court building has been closed by order of the Court or the Chief Justice, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, a federal legal holiday, or a day on which the Court building has been closed. See 5 U. S. C. § 6103 for a list of federal legal holidays.

.2. Whenever a Justice of this Court or the Clerk is empowered by law or these Rules to extend the time for filing any document or paper, an application seeking an extension must be presented to the Clerk within the period sought to be extended. However, an application for an extension of time to file a petition for a writ of certiorari or to docket an appeal must be submitted at least 10 days before the specified final filing date. If received less than 10 days before the final filing date, the application will not be granted except in the most extraordinary circumstances.

.3. An application to extend the time within which a party may file a petition for a writ of certiorari or docket an appeal shall be presented in the form prescribed by Rules 13.6 and 18.3, respectively. An application to extend the time within which to file any other document or paper may be presented in the form of a letter to the Clerk setting forth with specificity the reasons why the granting of an extension of time is justified. Any application seeking an extension of time must be presented and served upon all other parties as provided in Rule 22, and, once denied, may not be renewed.

.4. An application to extend the time for filing a brief, motion, joint appendix, or other paper, for designating parts of a record to be printed in the appendix, or for complying with

any other time limit provided by these Rules (except an application for an extension of time to file a petition for a writ of certiorari, to docket an appeal, to file a reply brief on the merits, to file a petition for rehearing, or to issue a mandate forthwith) shall in the first instance be acted upon by the Clerk, whether addressed to the Clerk, to the Court, or to a Justice. Any party aggrieved by the Clerk's action on an application to extend time may request that it be submitted to a Justice or to the Court. The Clerk shall report action under this Rule to the Court in accordance with instructions that may be issued by the Court.

Rule 31

TRANSLATIONS

Whenever any record to be transmitted to this Court contains any material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall immediately advise the Clerk of this Court to the end that this Court may order that a translation be supplied and, if necessary, printed as a part of the joint appendix.

Rule 32

MODELS, DIAGRAMS, AND EXHIBITS

.1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought to this Court for its inspection, shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

.2. All models, diagrams, and exhibits of material placed in the custody of the Clerk must be removed by the parties within 40 days after the case is decided. When this is not done, the Clerk shall notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk shall destroy them or make any other appropriate disposition of them.

Rule 33

PRINTING REQUIREMENTS

.1. (a) Except for papers permitted by Rules 21, 22, and 39 to be submitted in typewritten form (see Rule 34), every document filed with the Court must be printed by a standard typographic printing process or be typed and reproduced by offset printing, photocopying, computer printing, or similar process. The process used must produce a clear, black image on white paper. In an original action under Rule 17, 60 copies of every document printed under this Rule must be filed; in all other cases, 40 copies must be filed.

(b) The text of every document, including any appendix thereto, produced by standard typographic printing must appear in print as 11-point or larger type with 2-point or more leading between lines. The print size and typeface of the United States Reports from Volume 453 to date are acceptable. Similar print size and typeface should be standard throughout. No attempt should be made to reduce or condense the typeface in a manner that would increase the content of a document. Footnotes must appear in print as 9-point or larger type with 2-point or more leading between lines. A document must be printed on both sides of the page.

(c) The text of every document, including any appendix thereto, printed or duplicated by any process other than standard typographic printing shall be done in pica type at no more than 10 characters per inch. The lines must be double spaced. The right-hand margin need not be justified, but there must be a margin of at least three-fourths of an inch. In footnotes, elite type at no more than 12 characters per inch may be used. The document should be printed on both sides of the page, if practicable. It shall not be reduced in duplication. A document which is photographically reduced so that the print size is smaller than pica type will not be received by the Clerk.

(d) Whether printed under subparagraph (b) or (c) of this paragraph, every document must be produced on opaque, unglazed paper 6⅛ by 9¼ inches in size, with type matter ap-

proximately 4⅛ by 7⅞ inches and margins of at least three-fourths of an inch on all sides. The document must be firmly bound in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to make an easily opened volume, and no part of the text shall be obscured by the binding. Spiral and other plastic bindings may not be used. Appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

.2. Every document must bear on the cover, in the following order, from the top of the page: (1) the number of the case or, if there is none, a space for one; (2) the name of this Court; (3) the Term; (4) the caption of the case as appropriate in this Court; (5) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"); (6) the title of the paper (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix"); (7) the name of the member of the Bar of this Court who is counsel of record for the party concerned, and upon whom service is to be made, with a notation directly thereunder that the attorney is the counsel of record together with counsel's office address and telephone number. (There can be only one counsel of record noted on a single document.) The individual names of other members of the Bar of this Court, or of the Bar of the highest court of a State, and, if desired, their post office addresses, may be added, but counsel of record must be clearly identified. Names of persons other than attorneys admitted to a state Bar may not be listed. The foregoing must be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than 11-point or uppercase pica.

.3. Every document produced under this Rule shall comply with the page limits shown below and shall have a suitable cover consisting of heavy paper in the color indicated. Counsel must be certain that there is adequate contrast between the printing and the color of the cover.

Type of Document	Page Limits: Typographic Printing	Page Limits: Typed and Double Spaced	Color of the Cover
a. Petition for a Writ of Certiorari (Rule 14.4); Jurisdictional Statement (Rule 18.3); or Petition for an Extraordinary Writ (Rule 20.2)	30	65	White
b. Brief in Opposition (Rule 15.3); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); or Response to a Petition for Habeas Corpus (Rule 20.4)	30	65	Orange
c. Reply to Brief in Opposition (Rule 15.6); or Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	10	20	Tan
d. Supplemental Brief (Rules 15.7 and 18.9)	10	20	Tan
e. Brief on the Merits by Petitioner or Appellant (Rule 24.3)	50	110	Light Blue
f. Brief on the Merits by Respondent or Appellee (Rule 24.3)	50	110	Light Red
g. Reply Brief on the Merits (Rule 24.4)	20	45	Yellow
h. Brief of an *Amicus Curiae* at the Petition State (Rule 37.2)	20	45	Cream
i. Brief of an *Amicus Curiae* on the Merits in Support of the Petitioner or Appellant or in Support of neither Party (Rule 37.3)	30	65	Pastel or Pale Green
j. Brief of an *Amicus Curiae* on the Merits in Support of the Respondent or Appellee (Rule 37.3)	30	65	Green
k. Petition for Rehearing (Rule 44)	10	20	Tan

The above page limitations are exclusive of the questions presented page, the subject index, the table of authorities, and the appendix. Verbatim quotations required by Rule 14.1(f), if set forth in the text of the brief rather than the appendix, are also excluded. A motion for leave to file a brief *amicus curiae* filed pursuant to Rule 37 must be printed with the brief.

A document filed by the United States, by any department, office, or agency of the United States, or by any officer or employee of the United States represented by the Solicitor General shall have a gray cover.

A joint appendix and any other document shall have a tan cover.

In a case filed under the original jurisdiction of the Court, the initial pleading and motion for leave to file and any accompanying brief shall have white covers. A brief in opposition to the motion for leave to file shall have an orange cover; exceptions to the report of a special master shall have a light blue cover, if filed by the plaintiff, and a light red cover, if filed by any other party; and a reply brief to any exceptions shall have a yellow cover.

.4. The Court or a Justice, for good cause shown, may grant leave to file a document in excess of the page limits, but these applications are not favored. An application to exceed page limits shall comply in all respects with Rule 22 and must be submitted at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

.5. Every document which exceeds five pages (other than a single joint appendix) shall, regardless of the method of duplication, contain a table of contents and a table of authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, textbooks, etc.) with correct references to the pages in the document where they are cited.

.6. The body of every document at its close shall bear the name of counsel of record and such other counsel, identified on the cover of the document in conformity with paragraph .2(7) of this Rule, as may be desired. One copy of every

motion or application (other than a motion to dismiss or affirm under Rule 18) must in addition be signed by counsel of record at the end thereof.

.7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party any failure to comply. The filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court finds that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel.

Rule 34

Form of Typewritten Papers

.1. Any paper specifically permitted by these Rules to be presented to the Court without being printed shall, subject to Rule 39.3, be typewritten on opaque, unglazed paper 8½ x 11 inches in size and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double spaced. Copies, if required, must be produced on the same type of paper. All copies presented to the Court must be legible.

.2. The original of any motion or application (except a motion to dismiss or affirm under Rule 18.6) must be signed in manuscript by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court.

Rule 35

Death, Substitution, and Revivor; Public Officers

.1. In the event a party dies after filing a notice of appeal to this Court, or after filing a petition for a writ of certiorari, the authorized representative of the deceased party may appear and, upon motion, be substituted as a party to the proceeding. If the representative does not voluntarily become a party, any other party may suggest the death on the record and on motion seek an order requiring the representative to

become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, shall be entitled to have the petition for a writ of certiorari or the appeal dismissed or the judgment vacated for mootness, as may be appropriate. A party so moving who is a petitioner or appellant shall be entitled to proceed as in any other case of nonappearance by a respondent or appellee. The substitution of a representative of the deceased, or the suggestion of death by a party, must be made within six months after the death of the party, or the case shall abate.

.2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no authorized representative within the jurisdiction of that court, but does have an authorized representative elsewhere, proceedings shall be conducted as this Court may direct.

.3. When a public officer, who is a party to a proceeding in this Court in an official capacity, dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded.

.4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

Rule 36

Custody of Prisoners in Habeas Corpus Proceedings

.1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner shall not transfer custody to another person unless the transfer is authorized in accordance with the provisions of this Rule.

.2. Upon application by a custodian showing a need therefor, the court, Justice, or judge rendering the decision under review may authorize transfer and the substitution of a successor custodian as a party.

.3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged upon personal recognizance or bail, as may appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged upon personal recognizance or bail, unless the court, Justice, or judge rendering the decision, or the court of appeals, or this Court, or a judge or Justice of either court, shall otherwise order.

.4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

Rule 37

Brief of an Amicus Curiae

.1. An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

.2. A brief of an *amicus curiae* submitted prior to the consideration of a petition for a writ of certiorari or a jurisdictional statement, accompanied by the written consent of all parties, may be filed only if submitted within the time allowed for filing a brief in opposition to the petition for a writ

of certiorari or for filing a motion to dismiss or affirm. A motion for leave to file a brief *amicus curiae* when consent has been refused is not favored. Any such motion must be filed within the time allowed for the filing of the brief *amicus curiae*, must indicate the party or parties who have refused consent, and must be printed with the proposed brief. The cover of the brief must identify the party supported.

.3. A brief of an *amicus curiae* in a case before the Court for oral argument may be filed when accompanied by the written consent of all parties and presented within the time allowed for the filing of the brief of the party supported, or, if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. A brief *amicus curiae* must identify the party supported or indicate whether it suggests affirmance or reversal, and must be as concise as possible. No reply brief of an *amicus curiae* and no brief of an *amicus curiae* in support of a petition for rehearing will be received.

.4. When consent to the filing of a brief of an *amicus curiae* in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file indicating the party or parties who have refused consent, accompanied by the proposed brief and printed with it, may be presented to the Court. A motion will not be received unless submitted within the time allowed for the filing of an *amicus* brief on written consent. The motion shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case. The motion may in no event exceed five pages. A party served with the motion may file an objection thereto concisely stating the reasons for withholding consent which must be printed in accordance with Rule 33. The cover of an *amicus* brief must identify the party supported or indicate whether it supports affirmance or reversal.

.5. Consent to the filing of a brief of an *amicus curiae* is not necessary when the brief is presented on behalf of the

United States by the Solicitor General; on behalf of any agency of the United States authorized by law to appear on its own behalf when submitted by the agency's authorized legal representative; on behalf of a State, Territory, or Commonwealth when submitted by its Attorney General; or on behalf of a political subdivision of a State, Territory, or Commonwealth when submitted by its authorized law officer.

.6. Every brief or motion filed under this Rule must comply with the applicable provisions of Rules 21, 24, and 33 (except that it shall be sufficient to set forth in the brief the interest of the *amicus curiae*, the argument, the summary of the argument, and the conclusion); and shall be accompanied by proof of service as required by Rule 29.

Rule 38

Fees

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the Clerk are fixed as follows:

(a) For docketing a case on a petition for a writ of certiorari or on appeal or docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal pursuant to Rule 18.5, $300.00.

(b) For filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200.00.

(c) For the reproduction and certification of any record or paper, $1.00 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page.

(d) For a certificate under seal, $25.00.

(e) For a check paid to the Court, Clerk, or Marshal which is returned for lack of funds, $35.00.

Rule 39

Proceedings In Forma Pauperis

.1. A party desiring to proceed *in forma pauperis* shall file with the pleading a motion for leave to proceed *in forma pau-*

peris, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. See 28 U. S. C. § 1915. If the United States district court or the United States court of appeals has appointed counsel under the Criminal Justice Act of 1964, as amended, the party need not file an affidavit or declaration in compliance with 28 U. S. C. § 1746, but the motion must indicate that counsel was appointed under the Criminal Justice Act. See 18 U. S. C. § 3006A(d)(6). The motion shall also state whether or not leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted.

.2. The motion, and affidavit or declaration if required, must be filed with the petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, and shall comply in every respect with Rule 21, except that it shall be sufficient to file a single copy. If not received together, the documents will be returned by the Clerk.

.3. Every paper or document presented under this Rule must be clearly legible and, whenever possible, must comply with Rule 34. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

.4. When the papers required by paragraphs .1 and .2 of this Rule are presented to the Clerk, accompanied by proof of service as prescribed by Rule 29, they are to be placed on the docket without the payment of a docket fee or any other fee.

.5. The respondent or appellee in a case filed *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of 12 copies of a typewritten response, with proof of service as required by Rule 29, will suffice whenever the petitioner or appellant has filed typewritten papers.

The respondent or appellee may challenge the grounds for the motion to proceed *in forma pauperis* in a separate document or in the response itself.

.6. Whenever the Court appoints a member of the Bar to serve as counsel for an indigent party in a case set for oral argument, the briefs prepared by that counsel, unless otherwise requested, will be printed under the supervision of the Clerk. The Clerk will also reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

.7. In a case in which certiorari has been granted or jurisdiction has been noted or postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, as amended, 18 U. S. C. § 3006A.

Rule 40

Veterans, Seamen, and Military Cases

.1. A veteran suing to establish reemployment rights under 38 U. S. C. § 2022, or under any other provision of law exempting a veteran from the payment of fees or court costs, may file a motion to proceed upon typewritten papers under Rule 34, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

.2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without the prepayment of fees or costs or furnishing security therefor, but a seaman is not relieved of printing costs nor entitled to proceed on typewritten papers.

.3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Military Appeals pursuant to 28 U. S. C. § 1259 may proceed without the prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not relieved of the printing requirements under Rule 33 and is not entitled to proceed on typewritten papers except as authorized by the Court on separate motion.

PART VIII. DISPOSITION OF CASES

Rule 41

Opinions of the Court

Opinions of the Court will be released by the Clerk in preliminary form immediately upon delivery. Thereafter the Clerk shall cause the opinions of the Court to be issued in slip form and shall deliver them to the Reporter of Decisions who shall prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

Rule 42

Interest and Damages

.1. If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment was entered or was directed to be entered.

.2. When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

Rule 43

Costs

.1. If a judgment or decree is affirmed by this Court, costs shall be paid by the petitioner or appellant, unless otherwise ordered by the Court.

.2. If a judgment or decree is reversed or vacated by this Court, costs shall be allowed to the petitioner or appellant, unless otherwise ordered by the Court.

.3. The fees of the Clerk and the costs of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

.4. In a case involving a certified question, costs shall be equally divided unless otherwise ordered by the Court; but if a decision is rendered on the whole matter in controversy, see Rule 19.2, costs shall be allowed as provided in paragraphs .1 and .2 of this Rule.

.5. In a civil action commenced on or after July 18, 1966, costs under this Rule shall be allowed for or against the United States, or an officer or agent thereof, unless expressly waived or otherwise ordered by the Court. See 28 U. S. C. § 2412.

.6. When costs are allowed in this Court, the Clerk shall insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side shall not submit a bill of costs.

.7. If appropriate, the Court may adjudge double costs.

Rule 44

REHEARING

.1. A petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after the entry of the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty printed copies, produced in conformity with Rule 33, must be filed (except when the party is proceeding *in forma pauperis* under Rule 39), accompanied by proof of service as prescribed by Rule 29 and the filing fee required by Rule 38. The petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted

except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court.

.2. A petition for the rehearing of an order denying a petition for a writ of certiorari shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph .1 of this Rule, including the payment of the filing fee if required, but its grounds must be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay. One copy of the certificate shall bear the manuscript signature of counsel or of a party not represented by counsel. A petition without a certificate shall be rejected by the Clerk. The petition is not subject to oral argument.

.3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.

.4. Consecutive petitions and petitions that are out of time under this Rule will not be received.

Rule 45

PROCESS; MANDATES

.1. All process of this Court shall be in the name of the President of the United States.

.2. In a case coming from a state court, the mandate shall issue 25 days after the entry of judgment, unless the time is shortened or enlarged by the Court or a Justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of the petition. If the petition is then denied, the mandate shall issue forthwith.

.3. In a case coming from a United States court, a formal mandate will not issue unless specially directed; instead, the Clerk will send the court a copy of the opinion or order

of this Court and a certified copy of the judgment (which shall include provisions for the recovery of costs, if any are awarded). In all other respects, the provisions of paragraph .2 of this Rule apply.

Rule 46

Dismissing Cases

.1. Whenever all parties, at any stage of the proceedings, file with the Clerk an agreement in writing that a case be dismissed, specifying the terms with respect to the payment of costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.

.2. (a) A petitioner or appellant in a case in this Court may file a motion to dismiss the case, with proof of service as prescribed by Rule 29, and must tender to the Clerk any fees and costs payable. An adverse party may, within 15 days after service thereof, file an objection, limited to the quantum of damages and costs in this Court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all petitioners or appellants. The Clerk will refuse to receive any objection not so limited.

(b) When the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal, within 10 days thereafter, may file a reply, after which time the matter shall be submitted to the Court for its determination.

(c) If no objection is filed, or if upon objection going only to the quantum of damages and costs in this Court, the party moving for dismissal, within 10 days thereafter, tenders the whole of such additional damages and costs demanded, the Clerk, without further reference to the Court, shall enter an order of dismissal. If, after objection as to the quantum of damages and costs in this Court, the moving party does not respond with a tender within 10 days, the Clerk shall report the matter to the Court for its determination.

.3. No mandate or other process shall issue on a dismissal under this Rule without an order of the Court.

PART IX. APPLICATION OF TERMS AND EFFECTIVE DATE

Rule 47

TERM "STATE COURT"

The term "state court" when used in these Rules includes the District of Columbia Court of Appeals and the Supreme Court of the Commonwealth of Puerto Rico. See 28 U. S. C. §§ 1257 and 1258. References in these Rules to the common law and statutes of a State include the common law and statutes of the District of Columbia and of the Commonwealth of Puerto Rico.

Rule 48

EFFECTIVE DATE OF AMENDMENTS

These Rules adopted December 5, 1989, shall be effective January 1, 1990.

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AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on January 26, 1990, pursuant to 28 U. S. C. § 2072, and were transmitted to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1174. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such an amendment shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law. If Congress disapproves an amendment so transmitted it does not take effect.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, and 485 U. S. 1049.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

JANUARY 26, 1990

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence which has been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

FRIDAY, JANUARY 26, 1990

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rule 609(a)(1) and (2), as hereinafter set forth:

[See *infra*, p. 1177.]

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on December 1, 1990.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule.—For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

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I. Case or Controversy.

Standing to sue—Foreign corporations challenging their domestic subsidiaries' taxes.—Foreign corporations, sole shareholders of American subsidiaries, have Article III standing to challenge in federal court, on Foreign Commerce Clause grounds, accounting method by which a State determines subsidiaries' taxable income, since a ruling of unconstitutionality would prevent actual financial injury to corporations. Franchise Tax Board of California v. Alcan Aluminium Ltd., p. 331.

II. Double Jeopardy.

Collateral estoppel—Introduction of evidence relating to alleged criminal conduct for which defendant has been acquitted.—Introduction, at petitioner's bank robbery trial, of testimony relating to an alleged crime that he had previously been acquitted of committing, which Government used to strengthen its identification of him as bank robber, did not violate Double Jeopardy Clause's collateral-estoppel component, since prior acquittal did not determine ultimate issue in bank robbery case. Dowling v. United States, p. 342.

III. Due Process.

1. *Fundamental fairness—Introduction of evidence relating to alleged criminal conduct for which defendant has been acquitted.*—Introduction, at petitioner's bank robbery trial, of testimony relating to an alleged crime that he had previously been acquitted of committing, which Government used to strengthen its identification of him as bank robber, did not violate due process test of fundamental fairness, especially in light of trial judge's jury instructions explaining his acquittal and limited purpose for which testimony was being admitted. Dowling v. United States, p. 342.

2. *Ordinance regulating sexually oriented businesses—Licensing of motels renting rooms for fewer than 10 hours.*—Provision in a city ordinance regulating sexually oriented businesses that requires licensing of motels renting rooms for fewer than 10 hours does not violate Due Process Clause, since city has produced adequate support for its supposition that such rent-

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als result in increased crime or other secondary effects. FW/PBS, Inc. v. Dallas, p. 215.

IV. Freedom of Association.

Ordinance regulating sexually oriented businesses—Licensing of motels renting rooms for fewer than 10 hours.—Provision in a city ordinance regulating sexually oriented businesses that requires licensing of motels renting rooms for fewer than 10 hours does not place an unconstitutional burden on right to freedom of association, since such a limitation will not have any discernable effect on sorts of personal bonds that play a critical role in Nation's culture and traditions by cultivating and transmitting shared ideals and beliefs. FW/PBS, Inc. v. Dallas, p. 215.

V. Freedom of Expression.

Prior restraints—Ordinance regulating sexually oriented businesses.—Court of Appeals' judgment that a city ordinance requiring that, *inter alia*, sexually oriented businesses be licensed did not violate First Amendment despite its failure to provide procedural safeguards required by *Freedman* v. *Maryland*, 380 U. S. 51, is reversed. FW/PBS, Inc. v. Dallas, p. 215.

VI. Privilege Against Self-Incrimination.

Court order to produce missing child.—A mother who is custodian of her abused child pursuant to a juvenile court order may not invoke Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce child. Baltimore City Department of Social Services v. Bouknight, p. 549.

VII. Right to Jury Trial.

Exclusion of blacks—Peremptory challenges.—A white defendant had standing to raise a Sixth Amendment challenge to exclusion of black venire members from petit jury; however, his Sixth Amendment claim was without merit because a prohibition upon exclusion of cognizable groups through peremptory challenges has no basis in Amendment's text, is without support in this Court's decisions, and would undermine, rather than further, Amendment's guarantee of right to trial by "an impartial jury." Holland v. Illinois, p. 474.

CONSTRUCTIVE TRUST ON PENSION BENEFITS. See **Employee Retirement Income Security Act of 1974.**

CONTEMPT.

Sanctions against individual city councilmembers—Abuse of District Court's discretion.—Where a city was found liable for intentionally enhancing segregation in housing in violation of Title VIII of Civil Rights Act of 1968 and Equal Protection Clause, and city counsel agreed to a consent decree requiring enactment of a remedial ordinance but later refused to adopt

CONTEMPT—Continued.
ordinance, District Court's order imposing contempt sanctions against individual councilmembers until they voted for ordinance was an abuse of discretion under traditional equitable principles. Spallone v. United States, p. 265.

COURT-APPOINTED COUNSEL. See **Antitrust Acts.**

COURT-AUTHORIZED NOTICE OF CLASS ACTION. See **Age Discrimination in Employment Act of 1967.**

COURTS OF APPEALS.

Incorrect formulation of lower court's ruling.—Where District Court found that a state-court ruling that ineffective assistance of counsel claims are barred unless they were raised on direct appeal did not apply retroactively to bar petitioner's habeas corpus petition and, thus, denied relief on merits, Court of Appeals' affirmance, which was based on an incorrect view that lower court found that claim was barred because of petitioner's failure to raise it in state-court proceedings, was in error. Terrell v. Morris, p. 1.

CRIMINAL LAW. See **Constitutional Law,** II; III, 1; VII; **Courts of Appeals; Evidence.**

CUSTOMER DEPOSITS AS TAXABLE INCOME TO PUBLIC UTILITIES. See **Taxes,** 2.

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DEFENSE WITNESSES. See **Evidence.**

DEPOSITS AS TAXABLE INCOME TO PUBLIC UTILITIES. See **Taxes,** 2.

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DISCRIMINATION IN EMPLOYMENT. See **Age Discrimination in Employment Act of 1967; Subpoenas.**

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EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Prohibition on assignment or alienation of pension benefits—Imposition of constructive trust.—Where a union obtained a money judgment against petitioner, who had pleaded guilty to embezzling union funds, constructive trust in union's favor imposed by court on petitioner's pension benefits violates ERISA's prohibition on assignment or alienation of pension benefits. Guidry v. Sheet Metal Workers National Pension Fund, p. 365.

EMPLOYMENT DISCRIMINATION. See **Age Discrimination in Employment Act of 1967; Subpoenas.**

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Exclusionary rule—Impeachment exception.—State Supreme Court erred in expanding impeachment exception to exclusionary rule to allow State to introduce illegally obtained evidence to impeach testimony of defense witnesses other than defendant himself. James v. Illinois, p. 307.

EXCLUSIONARY RULE. See **Evidence.**

EXCLUSION OF BLACKS FROM JURIES. See **Constitutional Law,** VII.

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FEDERAL EMPLOYERS' LIABILITY ACT. See **Longshore and Harbor Workers' Compensation Act.**

FEDERAL INCOME TAXES. See **Taxes,** 1, 2.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 11—Sanctions against law firms.—A court is authorized to impose Rule 11 sanctions against individual attorney who signs a document—thus certifying that he has read it and that it is well grounded in fact and law—but not against signing attorney's law firm. Pavelic & LeFlore v. Marvel Entertainment Group, p. 120.

FEDERAL RULES OF EVIDENCE.

Amendment of Rules, p. 1173.

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FIFTH AMENDMENT. See **Constitutional Law,** II; III, 1; VI; **Foreign Relations Authorization Act, Fiscal Years 1986 and 1987.**

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FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEARS 1986 AND 1987.

Deductions from awards by Iran-United States Claims Tribunal—Fifth Amendment—Origination Clause.—Section 502 of Act, which requires that a percentage of any award made to an American claimant by Iran-United States Claims Tribunal be deducted and paid to United States Treasury, does not violate Fifth Amendment's Just Compensation or Due Process Clauses; argument that § 502 was enacted in violation of Origination Clause was not reached because question whether such claims present nonjusticiable political questions is presently pending before Supreme Court. United States v. Sperry Corp., p. 52.

FOREIGN SOVEREIGNS' OFFICIAL ACTS. See **Act of State Doctrine.**

FOREIGN TAX CREDIT. See **Taxes,** 1.

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FREEDOM OF EXPRESSION. See **Antitrust Acts; Constitutional Law,** V; **Standing to Sue.**

FREEDOM OF INFORMATION ACT.

Exemptions from disclosure—Documents gathered for law enforcement purposes.—Exemption 7, which exempts from disclosure "records or information compiled for law enforcement purposes," may be invoked to prevent disclosure of documents not originally created for, but later gathered for, law enforcement purposes. John Doe Agency v. John Doe Corp., p. 146.

FREE EXERCISE OF RELIGION. See **Taxes,** 3.

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JURISDICTION. See also **Labor; Racketeer Influenced and Corrupt Organizations Act; Standing to Sue; Taxes,** 3.

1. *Federal district courts—Diversity—Direct action proviso.*—Direct action proviso in 28 U. S. C. § 1332(c)—which specifies that in any direct action against a liability insurer, insurer shall be deemed a citizen of same State as insured for purposes of diversity jurisdiction—unambiguously applies only to actions *against* insurers, not actions *by* insurers. Northbrook National Insurance Co. v. Brewer, p. 6.

2. *Federal district courts—Subject-matter jurisdiction—Resource Conservation and Recovery Act of 1976.*—Where petitioner failed to comply with RCRA's notice and delay requirements before bringing a citizen suit against an alleged violator of RCRA's waste disposal requirements, action must be dismissed for lack of subject-matter jurisdiction. Hallstrom v. Tillamook County, p. 20.

3. *Federal district courts—Tax Injunction Act—Foreign corporations challenging their domestic subsidiaries' state taxes.*—Action by foreign corporations, sole shareholders of American subsidiaries, challenging in federal court, on Foreign Commerce Clause grounds, accounting method by which a State determines their subsidiaries' taxable income is barred by Tax Injunction Act—which prohibits district courts from enjoining state taxation where a plain, speedy, and efficient remedy may be had in state court—since, as sole shareholders, corporations have under their direction and control actual taxpayers that have such a remedy for their claims. Franchise Tax Board of California v. Alcan Aluminium Ltd., p. 331.

JURY SELECTION. See **Constitutional Law,** VII.

JUST COMPENSATION CLAUSE. See **Foreign Relations Authorization Act, Fiscal Years 1986 and 1987.**

LABOR. See also **Civil Rights Act of 1871; Employee Retirement Income Security Act of 1974.**

Fair representation claim—District court jurisdiction—Discrimination in job referrals.—District Court had jurisdiction over a fair representation suit alleging discrimination in hiring-hall referrals, since National Labor Relations Board's jurisdiction over such a claim is not exclusive; however, union's refusal to refer petitioner to employment through union hiring hall because of his political opposition to union's leadership does not give rise to a claim under §§ 101(a)(5) and 609 of Labor-Management Reporting and Disclosure Act of 1959, which forbids a union to "fir[e], suspen[d], expe[l], or otherwise disciplin[e]" a member for exercising LMRDA-secured rights. Breininger v. Sheet Metal Workers, p. 67.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See **Labor.**

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LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Maritime employment—Railroad employees.—Railroad employees were "engaged in maritime employment" within meaning of Act when performing duties essential to loading coal from railway cars to ships; thus, Act was exclusive remedy for their injuries, and suit under Federal Employers' Liability Act, which provides a negligence cause of action for railroad employees, was barred. Chesapeake & Ohio R. Co. v. Schwalb, p. 40.

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Supplemental Security Income—Child-disability benefits.—Regulatory scheme, which is used to determine whether a child is disabled and therefore eligible for Supplemental Security Income benefits, is inconsistent with statutory standard requiring that benefits be awarded to a child who suffers from an impairment of "comparable severity" to one that would render an adult disabled, since it is more restrictive than adult-disability test. Sullivan v. Zebley, p. 521.

STANDING TO SUE. See also **Constitutional Law,** I; VII.

Ordinance regulating sexually oriented businesses—Provision prohibiting licensing of certain applicants—Civil disability provisions.—In a suit challenging constitutionality of a city ordinance regulating sexually oriented businesses, petitioners lacked standing to challenge (1) provision prohibiting licensing of an applicant who has resided with an individual whose license application has been denied or revoked, and (2) civil disability provisions, which disable those who have been convicted of certain enumerated crimes, as well as their spouses. FW/PBS, Inc. v. Dallas, p. 215.

STATE-COURT JURISDICTION. See **Racketeer Influenced and Corrupt Organizations Act.**

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2. *Federal income taxes—Taxable income—Utility deposits.*—Deposits made by customers to assure prompt payment of electric bills to a public utility company are not advance payments for electricity and therefore do not constitute taxable income to utility upon receipt. Commissioner v. Indianapolis Power & Light Co., p. 203.

3. *Imposition of state sales and use tax on sales of religious material.*—State's imposition of a generally applicable sales and use tax on a religious organization's distribution of religious materials does not violate either Free Exercise or Establishment Clause; appellant's Commerce and Due Process Clause claim was not properly before this Court, since both trial and appellate courts ruled that claim was procedurally barred on ground that it was not presented to State as required by state law. Jimmy Swaggart Ministries v. Board of Equalization of California, p. 378.

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1. *"Accumulated profits."* Internal Revenue Code, 26 U. S. C. § 902. United States v. Goodyear Tire & Rubber Co., p. 132.

2. *"Otherwise disciplin[e]."* §§ 101(a)(5), 609, Labor-Management Reporting and Disclosure Act of 1959. 29 U. S. C. §§ 411(a)(5), 529. Breininger v. Sheet Metal Workers, p. 67.

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